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ABSTRACT

Proceedings of the 1981 conference on the legal and economic status of collective bargaining in higher education, sponsored by the National Center for the Study of Collective Bargaining in Higher Education and the Professions, are presented. Papers and authors are as follows: "Yeshiva Shock Waves" (David Kuechle); "The Yeshiva Case: One Year Later" (Joel M. Douglas); "Impact of Retrenchment, I" (Irwin H. Polishook); "Impact of Retrenchment in Higher Education, II" (Caesar J. Naples); "Third Party Intervenors in Conflict Resolution" (Robert Coulson); "Judicial Protection of Academic Freedom in Higher Education: The Aftermath of Roth and Sinderman" (Dena Elliot Benson); "Living Under the Contract: The Techniques of Collective Bargaining Contract Administration in Higher Education" (Neil Betten and William O. Oldson); "Living Under the Contract: The University of Maine Experience" (Samuel D'Amico and Joseph A. Stupak, Jr.); "Contractually Protected Senates at Four-Year Colleges" (Barbara Lee); "Arbitration in Higher Education: Is Academic Arbitration Sui Generis?" (Maurice C. Benewitz); "Psychology of Negotiations, I" (John Dunlop); "Psychology of Negotiations, II" (Ronald Levesque); "Union Legislative and Political Cooperation in the 1980's: I, Towards a Collective Bargaining Alliance in Higher Education" (Ernst Benjamin); "Union Legislative and Political Cooperation in the 1980's: II, The Prospects for Faculty Unity" (Perry Robinson); "Union Legislative and Political Cooperation in the 1980's, III" (Charles E. Olson); "Confidentiality and Due Process; Professor's Acting as the University, I" (James Dinnan); and "Confidentiality and Due Process, II" (Aaron Levenstein). (SW)

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THE LEGAL AND ECONOMIC STATUS OF COLLECTIVE BARGAINING IN HIGHER EDUCATION

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Proceedings
Ninth Annual Conference
April 1981

JOEL M. DOUGLAS, *Editor*

HE 015 066

National Center for the Study of
Collective Bargaining in Higher Education
and the Professions—
Baruch College—CUNY

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INTRODUCTION

The Ninth Annual Conference brought together nearly three hundred professors, college administrators, union leaders, scholars, students and arbitrators to explore the legal and economic issues facing collective bargaining in higher education. The Conference was designed around two major themes: law and economics. Thus, the participants were exposed to a diverse cross section of the problems confronting academic collective bargaining as well as possible solutions to these problems.

Design of the Conference

The U. S. Supreme Court decision on Yeshiva is still a dominant force and is expected to remain so for the foreseeable future. Thus, the questions raised by Yeshiva were of great concern to the Conference attendees and it was only appropriate that the opening plenary session be devoted to this topic. Included in the Conference kit was NCSCBHEP Newsletter Vol. 9, No. 2, analyzing the first-year experience of Yeshiva. Because of its importance that piece has been included in these Proceedings.

Other papers concentrated on legal areas including an evaluation of the legal status of tenure and academic freedom as well as a review of arbitration in higher education. The economic portion of the program featured a plenary session on the impact of retrenchment as well as the introduction of the NCSCBHEP computer program, BRAIN (Baruch Retrieval of Automated Information for Negotiations).

As part of its commitment to training, the Conference also included papers on negotiations psychology, contract administration and faculty senates. Representatives of the three major faculty organizations exchanged their views on union legislative and political cooperation in the 1980's.

The Program

The Conference program was the product of the consensus of the Center's Advisory Committees and to them belongs the credit for its success. Each of the presenters was free to approach their topic from any vantage point that they desired with only procedural guidelines suggested. Not all of the speakers submitted papers for publication. However, all sessions were taped and every effort was made to include an edited transcript in these Proceedings.

Monday morning, April 27, 1981

9:00 INTRODUCTION
Joel M. Douglas, Director, NCSCBHEP

WELCOME
Joel Segall, President, Baruch College--CUNY

9:30 PLENARY SESSIONS

A. YESHIVA AFTERMATH
Speakers: Julius G. Getman, Professor of Law, Yale University Law School; AAUP General Counsel

David Kuechle, Professor, Harvard University

Moderator: Joel M. Douglas

11:00 B. IMPACT OF RETRENCHMENT
Speakers: Irwin Polishook, President, PSC--CUNY; Vice President, AFT

Caesar J. Naples, General Counsel, SUS of Florida

Moderator: Robert Helsby, Director, PERS

12:45 LUNCHEON
Topic: THIRD PARTY INTERVENORS IN CONFLICT RESOLUTION
Speaker: Robert Coulson, President, AAA

Presiding: Joel Segall, President, Baruch College-CUNY

Monday afternoon, April 27, 1981

2:30 SMALL GROUP SESSIONS

Group A: THE LEGAL STATUS OF TENURE AND ACADEMIC FREEDOM
Speaker: Dena E. Benson, Professor of Law, Ohio Northern University

Discussant: David Newton, Vice Chancellor, Long Island University

Moderator: Frederick Lane, Professor of Public Administration, Baruch College--CUNY

Group B: LIVING UNDER THE CONTRACT
Speakers: Neil Betten, Professor of History, SUS of Florida
Past State Pres., United Faculty of Florida

Samuel D'Amico, Assoc. Vice Chancellor, Employee Relations, University of Maine

Moderator: Esther Liebert, Asst. to Pres. for Fac. and Staff Affairs, Baruch College--CUNY

Monday afternoon, April 27, 1981 (cont'd)

2:30 Group C: COMPUTERS AND COLLECTIVE BARGAINING
Speaker: Joseph Zackon, Assistant Director, McGill University, Labour Agreements Data Bank

Tuesday morning, April 28, 1981

9:00 SMALL GROUP SESSIONS

Group D: THE CONTRACTUALLY PROTECTED SENATE
Speaker: Barbara Lee, Carnegie Foundation

Discussant: Bernard Mintz, Exec. Asst. to President, William Paterson College of New Jersey

Moderator: Theodore H. Lang, Arbitrator; Professor of Education. Baruch College--CUNY; former Dir., NCSCBHE

Group E: ARBITRATION IN HIGHER EDUCATION
Speaker: Maurice C. Benewitz, Arbitrator; former Dir., NCSCBHE

Discussant: Thomas Mannix, Dir., Coll. Bargaining Services, Univ. of California Systemwide; former Actg. Dir., NCSCBHE

Moderator: Samuel Ranhand, Arbitrator; Professor of Management, Baruch College--CUNY

Group F: PSYCHOLOGY OF NEGOTIATIONS
Speakers: John Dunlop, Director of Negotiations, NEA

Ronald Levesque, Assoc. Exec. Secy., CAUT

Moderator: Erwin J. Kelly, Dir. of Conciliation, NYS PERB

11:00 PLENARY SESSION

UNION LEGISLATIVE AND POLITICAL COOPERATION IN THE 1980's
Speakers: Ernst Benjamin, Past Chairperson, AAUP Collective Bargaining Congress

Perry Robinson, Asst. Dir., College and University Department, AFT, AFL-CIO

Dale Lestina, Legislative Specialist, NEA

Moderator: Margaret K. Chandler, Professor of Business, Columbia University

Tuesday afternoon, April 28, 1981

1:00 LUNCHEON SYMPOSIUM

CONFIDENTIALITY AND DUE PROCESS
Speakers: James Dinnan, Professor, University of Georgia

Aaron Levenstein, Professor, Baruch College--CUNY; Chairman, Baruch Chapter PSC/AFT

Moderator: Jeffrey B. Tener, Assoc. Prof., Rutgers University Former Chairman, State of New Jersey PERC

3:00 SUMMATION

Joel M. Douglas

Acknowledgments

The Proceedings are widely recognized in the literature of academic collective bargaining as a major source of state-of-the-art developments. Although many persons are responsible for the successful production of this publication, a special note of appreciation must go to the faculty and staff of the National Center who generously gave of their time and shared their insights. The speeches were transcribed by Ruby N. Hill. As she has done for the past ten years, Evan G. Mitchell coordinated and administered the running of the Conference as well as the publication of this volume. A special word of thanks must also be given to Aaron Levenstein who graciously shared with me his knowledge and expertise which proved so valuable in the editing of these Proceedings. Finally, I wish to acknowledge the contribution of Phillis Freeman and the Baruch Word Processing Center in the production of this manuscript.

Joel M. Douglas

1. YESHIVA SHOCK WAVES

David Kuechle
Professor
Harvard University

Introduction

It did not take long for repercussions from the Yeshiva decision to be felt in other colleges and universities. On March 4, 1980, 13 days after the Yeshiva opinion was announced, the President of the University of New Haven announced that his university was terminating bargaining relationships with its faculty union - an American Federation of Teachers affiliate. At the time, the university and its union were negotiating their third contract. The union promptly filed an unfair labor practice charge for refusal to bargain, and the National Labor Relations Board issued a complaint. This case is still pending.

Since the Supreme Court's decision in the Yeshiva case, there have been 35 Yeshiva-related cases where private institutions, like New Haven University, have taken the position that their faculty are managerial and, consequently, excluded from coverage under the National Labor Relations Act. Most of these cases are still pending in various forums. Some have been decided, but these decisions provide meager guidance regarding the nature and direction of future bargaining relations with faculty unions.

The Yeshiva case has also generated shock waves outside of academic circles. For example, on March 17, 1980, the Alternative Food Workers Alliance of Sacramento, California, filed an unfair labor practice charge against the Sacramento Natural Food Coop Inc., a drive-in restaurant and retail food store, for refusal to bargain in good faith. The Food Coop's chief executive officer claimed that the workers were managerial. As such, they were not entitled to NLRA protection. The employer cited the Yeshiva case in support of his position. This case is also pending, and it raises the possibility that the Yeshiva case will have an impact on the non-education industries which employ professionals where those professionals are given considerable discretion and authority in their work.

So far, I am not aware of any Yeshiva-like cases in the public sector. However, there is reason to believe such cases will be brought - and fought - within the next several months in states where collective bargaining legislation is patterned after the National Labor Relations Act and where the legislation does not specifically include college and university faculty members as protected employees.

The purpose of this essay is to examine some of the key cases that have been decided so far, to look at action now taking place in response to Yeshiva, and from these to speculate regarding the consequences of Yeshiva on collective bargaining in colleges and universities. It is too early to discern a clear direction for labor relations among higher education faculties as a result of Yeshiva. It is not too late for persons in this audience to affect that direction. One thing is reasonably certain; that is, this same topic will be relevant a year from now, during the tenth annual conference of the National Center for Collective Bargaining in Higher Education, and there will be good reason for placing it on the agenda again!

Yeshiva Itself

There is value in having a look at Yeshiva University itself. What has happened there since the Supreme Court decision? Has the turmoil which accompanied faculty organizing efforts at Yeshiva subsided? What changes, if any, have been made in light of the decision?

Following the Supreme Court decision in 1980, Professor Paul Connolly, President of the Faculty Association Steering Committee at Yeshiva, presented Norman Lamm, President of the University, a list of actions that the Association wanted the President to take. Among these were the following:

- to recognize the Faculty Association Steering Committee as the official representative of the faculty,
- to revise the faculty handbook so that faculty and administrative behavior on matters of faculty welfare would be spelled out,
- to provide faculty members more information about the university's budget,
- for the president to publicly confirm that tenure at Yeshiva is inviolable - and to clarify the tenure status of faculty members.

At about the same time members of Yeshiva's faculty met with representatives of the American Federation of Teachers to explore the possibility of affiliation.

Yeshiva's administration responded to the Steering Committee's overtures with an expression of willingness to talk, through the already existing faculty welfare committees. The committees represented each of the university's separate schools and programs for the purpose of communicating with the administration regarding salaries, fringe benefits, and working conditions and had been in existence since 1973. They were perceived by faculty members to be ineffective, and it was this perception that played a large part in the faculty's fight to unionize.

Throughout the last decade Yeshiva has experienced severe financial difficulties. These gave rise to two separate salary freezes: one in 1971-72, the second in 1975-76. These freezes, supplemented by near austerity when the freezes were lifted, caused Yeshiva's average faculty salaries to fall substantially below those for faculty members at colleges and universities in the New York area which were comparable. Financial difficulties also were responsible for the discontinuance of several teaching programs. In one instance they resulted in the closing of a school - The Belfer School of Science. These instances gave rise to considerable insecurity as faculty members were displaced, dismissed, and reassigned within the university.

The faculty welfare committees operated constantly in the face of financial constraints, and still do. Consequently, when the university referred Professor Connolly to the welfare committees, this news was not well received.

Financial difficulties still plague Yeshiva. In 1978, in order to settle a $65 million debt with the Bowery Savings Bank, an agreement was made that Yeshiva University must attain a balanced budget by 1983. In February of 1980, Bowery sued Yeshiva in an effort to collect an outstanding $40 million mortgage on the university's four campuses. The bank charged that Yeshiva had failed to make six consecutive payments. Yeshiva, working with Peat, Marwick, Mitchell and Company, the accounting firm, worked out a repayment plan acceptable to the bank. By February of 1981, $35 million in debts remained. Fifteen million had been paid off. Five million more would have to be paid in June of 1981 and $15 million in February of 1982.

Sheldon Socol, Vice President of Administration, showed the financial statements to several members of Yeshiva's accounting faculty, and all acknowledged that the situation was serious. Nevertheless, faculty unrest became more pronounced following three months of negotiations with the welfare committees starting in December of 1979, after which the administration offered a 7 percent increase in salary. In addition, they offered to pay the faculty's portion of their disability insurance premiums and to provide a 75 percent tuition reduction for all children of Yeshiva faculty members attending Yeshiva University schools.

The faculty voted on October 17, 1980 to reject the pay offer while accepting the fringe benefits. Dr. Edward Levy, Chairman of one of the faculty welfare committees, said the faculty was seeking 11 percent, which he contended could be paid if there was a freeze on administrative salaries. According to Levy the faculty welfare committees had made a study which indicated that Yeshiva faculty salaries, which averaged $20,000, were considerably lower than those of faculty at comparable universities while administrative salaries were consistently higher than those at other universities: some by as much as 50 percent.

To demonstrate its dissatisfaction, the Faculty of Arts and Sciences at Yeshiva voted 44-14 to hold a job action. This action, known as a "teach-in", took place on December 29 and 30, 1980. This marked the first time in the university's history that the faculty had officially called on student support to aid its battle. The faculty welfare committees described the purposes of the teach-in as follows:

- to discuss the faculty's increasing financial distress,
- to inform students about the administration's continuing policy of disregard for dignity and well-being of their teachers and rabbis,
- to inform students about how administrative positions on financial and governance matters affect the quality of Yeshiva life,
- to seek student support of efforts to gain reasonable salaries and respect for all faculty members.

The faculty had considered other types of action. These included not giving out final examinations or not distributing grades, but they decided on the teach-in as something much less injurious to students. Welfare committee leaders said that given similar circumstances at other universities there would have been an all-out strike.

In short, the controversy at Yeshiva is continuing. There is a feeling among faculty members that all the original causes of unionism, and more, persist - that faculty members are not treated with dignity and respect and that this lack of respect has been and is the underlying cause of resentment and discontent. Some faculty members have said the discontent was aggravated even more when the Supreme Court said they were managers. Professor Ralph Behrends, the first president of Yeshiva University Faculty Association and now chairperson of the Association's successor, the Faculty Steering Committee, said the faculty were treated like employees of a business, not like "co-managers seeking academic professionalism". Behrends cited the resignation in early February of 1981 of Yeshiva's Vice President for Academic Affairs, Dr. Blanche Blank, as an example. Blank, who had assumed the Vice Presidency in 1977 during the faculty union's legal fights for recognition, was perceived as one who lent an open ear to faculty grievances and presented demands and needs of faculty members to the administration, mostly without success.

Dr. Blank's functions will be taken over on June 30 by Dr. Egan Brenner, who will carry the title of Executive Vice President. Faculty leaders were not consulted regarding these moves, stirring even greater concern and unrest.

Shock Waves in the Labor Movement

The Yeshiva situation has been an embarrassment among leaders of the American labor movement. Among the earliest, strongest and longest-lasting unions in the country are those with Jewish leadership and largely Jewish membership. Yeshiva, being the oldest and largest university operating as an independent institution under Jewish auspices, represented a contradiction to many principles held by these stalwart union leaders. So, it was not surprising when some of them made it known to leaders of faculty unions nationwide that they want to help in efforts to cast aside the Yeshiva decision and its effects. These efforts are presently taking place, and they are taking a number of different forms.

Among the first actions was to introduce a bill in Congress to overturn the Yeshiva decision. The bill, proposed in June of 1980, would exclude faculty members from the definition of groups not permitted to bargain collectively under the National Labor Relations Act. It reads as follows:

> No faculty member or group of faculty members in any educational institution shall be deemed to be managerial or supervisory solely because the faculty member or group of faculty members participate in decisions with respect to courses, curriculum, personnel or other matters of educational policy.

Prior to last fall's presidential election, Secretary of Labor Ray Marshall indicated that the Carter administration would support this, or similar forms of legislation as part of the Labor Law Reform Bill that would be submitted to the next Congress.

Now, with Ronald Reagan as president and with a Republican Senate, it is not likely that legislation to overcome the impact of Yeshiva will be forthcoming. In fact, there is some indication that the National Labor Relations Board, which supported the Yeshiva Faculty Union all the way to the Supreme Court, will be less likely to carry a subsequent case to the Court than would have been true under the Carter presidency. The Board was a party to the Yeshiva decision, and time-honored tests which had been used by them since 1970 to establish the legitimacy of faculty unions were thrown aside. Perhaps reflecting embarrassment at the outcome, the board's general counsel said that new standards were needed for determining whether faculty members were entitled to bargain, and he indicated a willingness to work with unions in establishing those standards. That willingness still exists, and efforts are being made in this regard. These, I think, have the greatest promise for straightening out the present confusion and unrest that pervades academic labor relations in the private sector; but this will take several years. In the meantime the composition of the National Labor Relations Board itself will change. The present chairman, John Fanning, has resigned - a matter of protocol so that the president can appoint his own chairman. Fanning will continue as a Board member until his term expires in December of 1982, but two new Board members will soon be selected by President Reagan. Whether these new members will be sympathetic to efforts that are intended to overcome the effects of Yeshiva is subject to considerable doubt.

Key Decisions

Several cases have been decided since Yeshiva that offer some guidance regarding the nature of future labor-management relationships in colleges and universities. Four are worthy of our attention.

University of Albuquerque (Case #28-UC-106)

In September of 1979, the NLRB had certified an affiliate of the American Federation of Teachers as the collective bargaining representative for faculty members at the University of Albuquerque. There were 95 members in the bargaining unit, and these consisted of all full-time faculty, certain part-time faculty, department chairmen, counselors, and staff nurses.

In March of 1980, shortly after the Yeshiva decision, the NLRB granted a petition by the university for a unit clarification hearing. In August the NLRB's regional director, Milo Price, ruled that most faculty members at Albuquerque were managerial and under the Yeshiva doctrine they did not have the right to bargain collectively under the federal law. He ruled that under the university's system of shared governance, "the faculty, as in Yeshiva, is in virtual control of academic matters".

Mr. Price noted that since 1966 the University of Albuquerque had a faculty senate with authority over faculty and academic matters. He found that since 1975 the senate had submitted more than 100 "determinations" on academic, institutional and other matters to the president, and the administration had vetoed or modified only "about seven".

He found that faculty members had "established basic skill requirements, made significant changes in the curriculum, changed degree requirements, initiated and approved new courses and degree programs, and established grading guidelines and policies".

In personnel matters, Mr. Price found that faculty members had established criteria for promotions, rank, tenure, leaves of absence, teaching load and a faculty teaching evaluation system".

As a result of these findings, Price ruled that all but eight of the proposed 95-person bargaining unit in effect managed the university and therefore could not engage in collective bargaining. The eight did not serve on any faculty or university committees. The union appealed the ruling to the full NLRB, and on April 6 the board ordered that the entire union be decertified.

Salem College

At Salem College, a private West Virginia institution, the administration refused to negotiate with their faculty union, an NEA affiliate, claiming that they were managerial employees like those at Yeshiva. The union, in turn, filed an unfair labor practice charge. Then, in October of 1980, two months after the Albuquerque ruling, the NLRB dismissed the case at the request of the union which had concluded that "at least some of the department chairpersons included in the bargaining unit probably could be deemed managerial under the post-Yeshiva criteria".

Representatives of the union, in taking this action, said they were not validating the administration's assumption that the teaching faculty, as a whole, were managerial - stating that they were not barred from seeking a new bargaining unit that would meet Yeshiva criteria. They are now seeking to comprise such a unit, but will probably wait until the Boston University case has been decided before petitioning the Board again.

Boston University

In May of 1979, Boston University (BU) faculty members, affiliated with AAUP, achieved a collective bargaining agreement with the BU administration following five years of organizing activity, NLRB hearings, court battles, and a bitter strike. At the time of the Yeshiva decision a case was pending before the U.S. Supreme Court as to whether department chairpersons at BU should have been included in the bargaining unit. Following Yeshiva, the Court remanded the case to the First District of the National Labor Relations Board in Boston for a unit determination in light of the Yeshiva decision. Hearings are presently underway, and they involve the status of all members of the bargaining unit, not only department chairpersons. These hearings are expected to last for four to five months and could have an important impact on setting post-Yeshiva criteria for faculty unions.

Ohio Northern University

The Ohio Northern faculty union, affiliated with NEA, had a contract with the university which provided that either party could terminate the agreement if any part of the bargaining unit was declared to be inappropriate. Following action by the university challenging the bargaining unit, the NLRB's Regional Director revoked

certification of the union, stating that the faculty "possess indicia of managerial authority within the meaning of 'Yeshiva' and are excluded from coverage of the Act".

As a result, the university terminated the collective agreement but indicated that they would continue to implement the substance of the faculty personnel policies and procedures included in the agreement "except for those features involving the (faculty union)".

The Ohio Northern case set a tone which is typical of many of the colleges and universities where Yeshiva-like challenges have arisen. That is, they have taken steps to either implement or continue personnel policies and practices and, in some cases, to alleviate apparent grievances, while awaiting the resolution of theirs, and others' cases. In a similar vein, New Haven University has established a joint Faculty Administration Committee to study the "collegiality" issue, and the university administration has stated its desire to reinforce and strengthen collegiality by considering faculty as part of the managerial team. At Boston University the collective bargaining agreement is in force and is being implemented. There has been no move to terminate it. At Yeshiva, where it all started, the situation is still bad, but that appears to be an exception - in spite of all the challenges to faculty unions elsewhere.

The most interesting, and most important, activities related to the Yeshiva case are presently taking place behind the scenes. By and large, they involve efforts by faculty union leaders, top-level college and university administrators and consultants to fashion a set of guidelines in cooperation with the National Labor Relations Board that pay heed to the unique characteristics of the higher education industry while, at the same time, recognizing that some faculties, like Yeshiva's, have need for protection under some form of collective bargaining legislation.

This is a formidable effort which is resulting in a form of soul-searching that may be unique in higher education. It is an effort by educators and those interested in education to educate others. One by-product of this effort has been a moving together by the principal faculty unions - burying their differences, at least for the time being, and concentrating on jointly-shared objectives. The guidelines may be applied in the first instance to the Boston University case, thus, once again, putting the spotlight on BU.

It is useful, I think, for us to consider and debate these efforts. They are an effort to bring and end to the Yeshiva turmoil and, in my opinion, have the best chance to succeed. The American Federation of Teachers has summarized them in a submission to the General Counsel of the National Labor Relations Board. While AFT leaders and counsel have put a great deal of time and energy into this submission, it should be recognized as an effort that involved many people outside AFT - labor, management, and neutrals.

The submission by AFT suggests two broad standards for consideration by the NLRB and courts in future cases where faculties seek to form unions.

1. Any conclusion that faculty are managerial should rest on a fully-developed factual record showing absolute control over matters of academic policy.

2. There is a distinction between the absolute authority over academic matters found by the Supreme Court at Yeshiva and that which is exercised by most faculties.

Regarding the first of these standards, the NLRB and courts are urged to adopt the view that collective bargaining is fully compatible with traditional concepts of academic governance. To back this point, the AFT submission argues that the court in Yeshiva did not hold that faculty input or participation in academic governance resulted, in itself, in managerial status. It follows, then, that each faculty member's job responsibilities must be examined to determine the extent of managerial authority held. One of the important ingredients of this determination will be the degree of participation in academic governance. But an entire faculty should not be excluded except where they exercise virtually absolute authority over academic policy matters.

The second standard urged by the AFT submission sets forth certain criteria for thinking about the decision-making process in colleges and universities. It suggests that there are three categories of decisions engaged in by faculty members.

1. Policy decisions - those dealing with the overall mission of the institution and the acquisition and allocation of resources to carry out this mission.

2. Academic decisions - those dealing with such matters as curriculum, grading policies, and admissions standards.

3. Personnel decisions - those involving matters of salary, promotion, nonrenewal of contracts, granting or denial of tenure, sabbatical leave policies, word load and other conditions of work.

Regarding "policy" decisions, the AFT submission says that faculty input is provided at many institutions - especially regarding establishment of new academic programs. However, there are few, if any, institutions where policy decisions are controlled by the faculty. Thus, this category of decision-making is unlikely to be one where a managerial role for the faculty will be convincingly demonstrated.

Academic decisions are probably the area of greatest faculty influence in most institutions, and these will require the greatest attention in post-Yeshiva cases, because it was here that the majority members of the Supreme Court focused their attention in denying the Yeshiva faculty protection under the National Labor Relations Act. According to the majority opinion:

> (The Yeshiva faculty's) authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these.

According to the AFT submission, the authority of most faculties in academic matters is not absolute. At most colleges and universities academic decisions are relatively routine and are the product of well-established governing policies - thus not managerial in nature. This will be especially true in the area of grading students and admissions policies.

Curriculum decisions may be the most important area of faculty influence. Here, according to the AFT submission, there needs to be a line drawn between proferring professional advice, routine participation in the decision-making process and substantial control over managerial decision-making. Virtually all curriculum decisions are related to a professor's teaching responsibilities - activity that should be viewed as non-managerial, in the sense that such decisions reflect knowledge and understanding of what is likely to work in a classroom.

The AFT's recommendations for NLRB guidance state that three questions should be asked regarding academic decisions before deciding whether these are managerial in nature.

1. How important are these decisions to the overall mission and direction of the institution?

2. To what extent does the faculty control the decision process, and to what extent are such decisions regarded as more than routine?

3. Who among the faculty participate in such decisions and what is the nature of that participation in time and meaningful effort?

The third category of decisions - personnel decisions - should be subdivided into subheadings:

a. managerial personnel decisions
b. academic personnel decisions

"Managerial" personnel decisions are those which involve establishment of salary ranges, work loads and conditions of work such as classroom assignments, office assignments, scheduling and secretarial support. "Academic" personnel decisions regard changes in faculty status: hiring, promotion, reappointment and tenure, and salary increases within established ranges. With regard to the former, most faculties have little or no input. With regard to the latter, many faculties have considerable input. This so-called "peer judgment" system has long been an important part of academic life. It is rooted in two notions. First, the fair and thorough evaluation of faculty members on their merits is essential to preserve academic freedom and to maintain institutional standards. And second, one's peers are uniquely in a position to make these evaluations.

These distinctions are obscure to most persons outside academia, but they are crucial to understanding colleges and universities. In the first instance, peer judgment is not managerial in nature. On the other hand, faculty members who make these judgments may be acting in a supervisory manner, but the matter of supervisory status never was

discussed in the Yeshiva decision. It is important to note, however, that this peer-judgment system, which is unique in higher education, is different in its origin and practice from the notions of supervisory authority which resulted in passage of section 2(11) of the National Labor Relations Act which excludes supervisors from coverage. The need for industrial managers to have "loyal" foremen is vastly different from the need of an administration and governing board of a college or university for sound advice regarding the qualifications and accomplishments of their faculty peers. These differences, according to the AFT submission, must be clearly delineated.

Conclusions

1. The aftermath of the Yeshiva decision has brought forth a rash of cases, many of which, if pushed to conclusion, will help set post-Yeshiva standards for determining eligibility of college and university faculty members to form unions. So far, decisions that have been made have provided meager guidance.

2. The Yeshiva case itself offered few guiding principles, so that post-Yeshiva cases which are heard by the National Labor Relations Board and the courts will often be looked upon as precedent-setting. This means that unit determinations will have to be made on a case-by-case basis wherein each potential unit member is assessed regarding the degree of managerial or supervisory input and authority she/he has in each of the three major categories of managerial decision-making.

3. The process will be time-consuming, frustrating and costly.

4. The National Labor Relations Board will play a key role in this venture. To the degree that faculty unions and college and university adminstrators can work together to help form guidelines that all can live with, along with the NLRB, considerable time, expense and frustration will be averted. The AFT submission, which represents considerable effort by persons inside and outside faculty unions, offers a take-off point for meaningful discussion.

5. The Yeshiva case has created turmoil, and this will most likely continue for years to come. It may spread to the public sector and, perhaps, to other business outside of education. Those colleges and universities which are already frustrated by the uncertainty which Yeshiva presents and who want to avoid the acrimony that characterized Yeshiva are well advised to forge a relationship of their own - to bargain voluntarily if it seems to be in their best interests and, if not, to build a constructive relationship with each other that acknowledges the need to work together for a considerable length of time based on uncertainty.

It is important that active, creative energy be devoted to the problem at hand by all parties who have been, or are likely to be affected. It is also important that this subject be revisited a year from now.

2. THE YESHIVA CASE: ONE YEAR LATER

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When United States Supreme Court Justice Powell wrote in Footnote No. 31 to National Labor Relations Board v. Yeshiva University, 444 U.S. 672 (1980), that this ruling was applicable only to the case at hand and that "there thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominately nonmanagerial," he never realized the number of 'Yeshiva Universities' he had instantly created. In the time that has elapsed since this landmark 5-4 decision, which held that the entire faculty at Yeshiva University was managerial and, thus, not entitled to bargain collectively under the protection of the National Labor Relations Act, the halls of academe have been filled with speculation, litigation, research and confusion over the meaning and application of the case. Clearly, the end of a decade had come. For the first time since it began exercising jurisdiction over faculty collective bargaining in the early 1970s, the NLRB had been reversed on an issue of faculty unionism.

In order to appreciate the events that have occurred during the past eighteen months with respect to faculty collective bargaining and governance, one must be familiar with the principles of labor law that were instrumental in the development and the construction of the respective positions set forth in the case. Post-Yeshiva events in both faculty governance and other employment relationships within higher education will be examined with a look towards what may lie ahead. It is for that reason we must begin with a review of the appropriate case law that led to Yeshiva.

Legal Framework

With its ruling in Cornell University, 183 NLRB 329 (1970), the NLRB set aside its previous position, which had held that private universities and colleges were not covered by the National Labor Relations Act as they did not sufficiently impact on interstate commerce. Cornell placed the Board in the position of applying well-established labor relations principles, founded in and for industrial work places to university settings in which collegial forms of governance had evolved. The Board delineated its "collective authority" concept in C.W. Post Center of Long Island University, 189 NLRB 904 (1971), and established in Fordham University, 193 NLRB 134 (1971), additional standards for dealing with issues of faculty inclusion and coverage under the Act. By rejecting additional university arguments in Northeastern University, 218 NLRB 904 (1971), and Miami University, 213 NLRB 634 (1974), the Board continued to stand by its ruling in C.W. Post Center.

The position that faculty are both managerial and supervisory and exempt from coverage under the Act was rejected in NLRB vs. Wentworth Institute, 515 F. 2d 550 (1st Cir. 1975). This ruling was upheld by the United States Court of Appeals for the First Circuit, which held that, "there was no evidence of an instance of significant faculty impact collectively or individually on policy or managerial matters" (515 F. 2d 550, 557). Furthermore, the allegation raised by the employer that all faculty at all institutions of higher learning are not entitled to coverage under the act was expressly repudiated. Thus, with this legal framework clearly established most observers were somewhat surprised when these arguments surfaced once again in NLRB vs. Yeshiva University, 582 F. 2d 686 (2nd Cir. 1978).

The case of Yeshiva University appeared to be similar to dozens of others that had been appealed unsuccessfully to the NLRB by colleges and universities who either refused to bargain collectively with duly certified unions or sought to challenge the coverage and scope of the Act as it applied to faculty inclusion. Yeshiva University took the position that the faculty were supervisors or managers or both and, thus, were not entitled to coverage under the Act; however, the Board found the faculty to be professional employees under the meaning of the Act and, thus, in the protected category. The Faculty Association was successful in a representation election and emerged as the duly certified exclusive bargaining agent for a unit consisting of all full-time faculty. The university refused to comply with the Board's subsequent order to bargain and in a case argued before the United States Court of Appeals for the Second Circuit was upheld in its original contentions that the faculty were indeed managers and not entitled to bargain under the protections of the Act. It was this case that led the NLRB to seek and obtain a writ of certiorari appealing the decision of the circuit court.

The United States Supreme Court, in a 5-4 decision, upheld the findings of the appellate court:

> The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.

The ruling was received with degrees of apprehension and perplexity. Groups opposed to faculty unionization saw an immediate end to collective bargaining (indeed the story that appeared in the New York Times initially predicted an end to negotiations), whereas faculty unionists saw a return to recognition strikes, economic pressure, censure, and employment sanctions as the only recourse open to them. As is often the case, neither extreme proved to be correct. For the majority of the over 400 colleges and universities that bargain collectively, business continued as usual with little, if any, reference being made to Yeshiva. The number of reported strikes at the outset of the fall 1980 semester was less than ten (NCSCBHEP Newsletter, Vol. 8, No. 4).

A notable exception to this was the recent two week strike at Wagner College where the issue of unit recognition was a major impasse item. The strike was finally settled when both parties agreed to refer this problem to a three member panel consisting of lawyers chosen by each side with the Regional Director of FMCS selecting the neutral lawyer. The panel will be charged with the responsibility of writing a new recognition clause that will protect the interest of the College in its pending litigation before the NLRB while at the same time providing for the continuation of the the new contract through August 31, 1982. The faculty have agreed not to introduce the newly executed CBA before the Board in any matters of litigation. This settlement is somewhat indicative of how Yeshiva-related issues are being resolved on a campus by campus basis.

Impact of Yeshiva

The question of what has happened on the campus since Yeshiva cannot be answered without taking into account the fourteen month delay by the NLRB in issuing any Yeshiva-like standards and the absence of any federal court ruling on the subject except to remand or deny certiorari. Thus the fact that the immediate impact of the decision has been somewhat minimal does not in any way diminish its significance. Several factors explain the minimal impact. Perhaps most significant, over 70 percent of the colleges and universities that bargain collectively are in the public sector, where bargaining is governed by statewide enabling legislation or individual trustee policy. These institutions have been protected from a Yeshiva spillover by the existence of statutory public sector labor laws.

Research conducted by the National Center for the Study of Collective Bargaining in Higher Education and the Professions at Baruch College, CUNY, indicates that as of May 1, 1981, nearly 40 private institutions have exercised some type of Yeshiva-like claim. For the purpose of research design and statistical grouping, these institutions have been classified into the following categories: a) those that have refused to bargain a successor agreement with a certified bargaining agent; b) those that have refused to bargain an initial agreement with a certified agent; and c) those that have raised a challenge to a bargaining unit representational claim or status issue.

Table 1 identifies those institutions that have exercised a Yeshiva-like claim, either before the NLRB, a court, or directly to a faculty group during the course of either union certification hearings or negotiations. The table is designed to be all-encompassing, citing those institutions that have litigated the matter to the Supreme Court as well as those that have been asked to file memoranda with the board outlining their individual claim. A majority of these institutions are small liberal arts colleges with reported financial problems. Observers have commented that in these institutions financial pressures might be so overwhelming that the cost of doing continued business with the union raises the issue of their future existence.

Management Approaches Post-Yeshiva

It is an old adage in labor relations that the employer acts, causing the union to react. This maxim has been proved true during this post-Yeshiva year. In those institutions where management has not sought faculty exclusion from coverage under the Act, business has continued to operate as usual with both parties continuing to enjoy whatever rights they have had under the collective bargaining agreement. Some attribute

TABLE 1. - INSTITUTIONS EXERCISING YESHIVA-LIKE CLAIMS

Institution	State	Agent
Adrian College	Michigan	NEA
American International College	Massachusetts	AAUP
American University	Washington, D.C.	AAUP
Ashland College	Ohio	AAUP
Boston University	Massachusetts	AAUP
Catholic University of America Law School	Washington, D.C.	Indep.
College of Osteopathic Medicine	Iowa	AFT
Cooper Union	New York	AFT
C.W. Post Center of Long Island Univ.	New York	AFT
Cottey College	Missouri	AFT
Curry College	Massachusetts	AAUP
Daemen College	New York	AAUP
Drury College	Missouri	AFT
Duquesne University School of Law	Pennsylvania	Faculty Assn.
Florida Memorial	Florida	UFF/AFT
Ithaca College	New York	NYSUT/AFT
Lewis University	Illinois	AFT
Livingston College	North Carolina	AFT
Long Island Univ. - Brooklyn Center	New York	AFT
Loretto Heights College	Colorado	NEA
Mount Vernon College	Washington, D.C.	AAUP
Nasson College	Maine	AFT
Ohio Northern University	Ohio	NEA
Polytechnic Institute of New York	New York	AAUP
Saint Theresa College	Minnesota	AAUP
Salem College	West Virginia	NEA
Seattle University	Washington	AAUP
Stephens College	Missouri	AFT
Stephens Institute/Academy of Art College	California	Indep.
Stevens Institute of Technology	New Jersey	AAUP
Southampton College of Long Island Univ.	New York	AFT
Thiel College	Pennsylvania	AAUP
University of Albuquerque	New Mexico	AFT
University of New Haven	Connecticut	AFT
Villanova University	Pennsylvania	AAUP
Wagner College	New York	NYSUT/AFT
Yeshiva University	New York	Indep.

Source: NCSCBHEP research.

enlightened college administrations to these institutions; others argue that the issue is still too new and that these institutions are waiting to see which way the post-Yeshiva cases are decided before making their decisions.

The majority of the private institutions that engage in collective bargaining have continued to do so. There is no record of any college under a collective bargaining agreement at the time of the decision that has refused to honor a contract for its remaining duration although the situation at Lewis University might fall into this category. At Lewis three faculty contracts with expiration dates of June 30, 1980 were voided in March of 1980. The substance of the agreements, less any references to collective bargaining and union security, were converted into faculty handbooks. The validity of the university's actions, which were clearly based on Yeshiva, is now before the regional NLRB in Chicago with a decision expected shortly.

Although thirty-seven institutions have exercised some type of Yeshiva claim, there is no reason to believe that most private colleges are planning to refuse to negotiate successor agreements.

The post-Yeshiva managerial responses thus far have taken the following forms:

- outright refusal to bargain successor agreements (see Table 2)
- refusal to bargain initial agreements, raising Yeshiva-like issues with either the NLRB or the courts (see Table 3)
- movement to have union certification proceedings halted pending resolution of Yeshiva claims (see Table 4)
- use of threat of Yeshiva at the bargaining table as leverage to win concessions
- movement to have union voluntarily declare itself a unit of managerial employees and continue to bargain without protection of the Act
- threat to union of prolonged and expensive litigation if it does not withdraw election or certification petitions pending before the NLRB

Table 2 lists those institutions that, according to most reports, have refused to negotiate successor agreements, citing Yeshiva as the authority. This action is considered the most serious, for management has clearly sought to end a collective bargaining relationship in a unilateral manner. This claim was first exercised by the University of New Haven, which broke off negotiations for a successor agreement with the local AFT affiliate.

Cooper Union exercised its claims at the time of the selection of a new president. Unionists at the campus level were partially successful in staging a boycott of his inauguration after he reportedly supported the decision by the college to refuse to bargain a successor collective agreement. It is interesting to note that the boycott was supported, in part, by labor and political leaders, including a U.S. senator from New York who refused to cross the faculty picket line.

At Ashland, Loretto Heights, and Polytechnic Institute, collective bargaining relationships, established in the early 1970s, were among the first to be broken off. Speculation arose that those institutions, which heretofore had been party to long-standing labor agreements, had found unionization so untenable that they were eager to find legal precedent to buttress their decision to end bargaining.

Ohio Northern University is perhaps the most dramatic case to occur thus far. In his decision to revoke the certification of the faculty bargaining agreement, the regional director of the NLRB held that the faculty .... "possess indicia of managerial authority within the meaning of the Supreme Court's decision in NLRB vs. Yeshiva .... and are excluded from the coverage of the Act." The contract contained a liquidation clause which provided that either party may terminate the collective agreement if any part of the bargaining unit were declared to be inappropriate. Thus, while it appears that the existing contract is no longer valid, the University has reaffirmed its commitment ... "to continue to implement the substance of the faculty personnel policies and procedures included in the agreement except for those features involving the Association." While the situation remains somewhat fluid at this time, it appears that the regional National Labor Relations Boards may in essence be setting the posture that the full board may choose to adopt in subsequent cases. An appeal has been filed by the Ohio Northern Faculty Association.

Those institutions that have refused to negotiate initial contracts with duly certified faculty unions are identified in Table 3. These schools have exercised their Yeshiva claim at a time subsequent to their faculty organization being certified although, in certain instances, arguments similar to those used in Yeshiva may have been brought forth at a time of the original NLRB certification hearings. Of this group, two were thought to be especially significant to potential post-Yeshiva litigation: Ithaca

TABLE 2. - INSTITUTIONS THAT HAVE REFUSED TO BARGAIN SUCCESSOR AGREEMENTS

Institution	Certification Date	Contract Expiration Date	Size of Bargaining Unit[a]
Adrian College	1975	8/31/79	56
Ashland College	1972	8/14/77 (extended & Supplemented)	82
College of Osteopathic Medicine	1975	6/30/81	60
Cooper Union	1976	8/31/80	55
Cottey College[b]	1976	8/31/81	32
Florida Memorial	1979	(reached tentative agreement spring 1980; contract never put into effect)	35
Lewis University	1975	6/30/80	97
Loretto Heights	1972	5/31/80	100
Nasson College	1977	8/31/81	40
Polytechnic Institute of New York	1971	5/31/80	214
Stevens Institute of Technology, New Jersey	1976	1/15/80	109
University of New Haven	1979	8/31/79	130

Source: NCSCBHEP research.

a Unit size at time of certification or otherwise amended. Numbers subject to fluctuation dependent upon growth of institution. Source: NCSCBHEP Directory of Faculty Contracts and Bargaining Agents.

b Reportedly broke off negotiations for successor agreement; however, have since stated will honor their current agreement.

TABLE 3. - INSTITUTIONS THAT HAVE REFUSED TO BARGAIN INITIAL CONTRACTS WITH CERTIFIED UNIONS

Institution	Certification Date
Catholic University of America Law School	1977
Curry College	1979
Daemen College	1979
Drury College	1979
Ithaca College	1978
Mount Vernon College	1977
Salem College	1979
Stephens College (Missouri)	1979

Source: NCSCBHEP research.

College, where the union fell one vote short of the required four needed to obtain certiorari by the Supreme Court, and Salem College where the faculty association unexpectedly withdrew its petition challenging the administration's refusal to bargain.

Union Responses

The response of the faculty unions to Yeshiva has been, at best, a mixed one. The initial reaction, that Yeshiva was limited to one particular institution, quickly gave way to a concerted legal drive designed to litigate and distinguish each issue with the hope of building a record of lead cases that will eventually erode and restrict the decision to a handful of isolated colleges. An interesting sidelight arising out of this case is the degree of cooperation demonstrated by the legal staffs of the AAUP, AFT, and NEA who now find themselves in a coalition for the purpose of minimizing and, perhaps, overturning this decision.

The legal position of the unions in the post-Yeshiva period appear to be concentrated on the following:

- place the burden of proof on the employer to show the applicability of Yeshiva
- build a record on appeal showing the inapplicability of the so-called ninety percent Yeshiva rule (This rule refers to the fact that in over ninety percent of the instances cited, at Yeshiva University, the administration acted on faculty recommendations.)
- continue to file unfair labor practice charges before the NLRB in those cases where institutions refuse to negotiate successor agreements
- request that NLRB move in federal court for compliance with board-issued orders to bargain
- request that courts defer to the expertise long established by the NLRB in issues such as unit determination and coverage under the Act
- seek certiorari by the Supreme Court in bringing forth cases in which they believe that the record produced will warrant exceptions to Yeshiva
- consider the option of negotiating new recognition clauses admitting that they now represent units of managerial employees, and thereby lose the protection of the Act, but gain the benefits of a continued labor agreement
- withdraw petitions for NLRB certification hearings after institution has raised Yeshiva-like questions or the union becomes aware that its governance pattern closely resembles the record described in Yeshiva

Challenges that have been voiced about the appropriateness of the bargaining unit and other representational issues associated with Yeshiva are identified in Table 4.

The approach reportedly taken at C.W. Post and Southampton is somewhat unique inasmuch as the parties may have circumvented the problems raised by Yeshiva by redefining the recognition clause from that of a faculty unit to one of a managerial unit and continuing to bargain without the protection of the NLRB. The Boston University decision will be significant, not only for the ruling on the issue of chairperson inclusion in the unit, but for the importance that the entire higher education labor relations community appears to have attached to this case.

Two recent rulings in the matter of the University of Albuquerque, one by the regional director and the second by the Board itself may have served to crystallize and focus in on the totality of governance issue. In Albuquerque, the union's brief appealing the decision of the regional director, which reduced the faculty bargaining unit from ninety-five to eight argued that in "attributing the putative authority of a minority of the faculty to the faculty as a whole, the Regional Director extended the Yeshiva decision far beyond its reach and plainly misapplied Board law as well." In the subsequent action, the NLRB affirmed the ruling of the regional director and revoked the bargaining agent's certification for the entire faculty, once again, citing Yeshiva. The Albuquerque case is believed to be the first which the full Board has acted upon since the U.S.S.C. ruling in Yeshiva.

The unions have also tried some legislative and political approaches in responding to the Yeshiva decision. The major legislative approach has been to seek an amendment to the Act that would extend NLRA coverage to faculty members and create a new definition of higher education managers and supervisors. Faculty would no longer be excluded from bargaining under the protection of the Act for the types of activities that the court found on the record in Yeshiva. Such a bill was proposed by the AAUP and introduced by Rep. Frank Thompson, Jr., Chairman of the House Subcommittee on Labor Management Relations in the 96th Congress. The bill provided that: "No faculty member or group of faculty members shall be deemed to be managerial or supervisory employees soley because the faculty member or groups of faculty members participate in decisions with respect to courses, curriculum, personnel, or other matters of educational policy."

Observers of the 97th Congress are offering little hope of labor law reform legislation with respect to the issue of increased unit inclusion and coverage under the protection of the Act.

Other examples of legislative or political action by faculty unions have included:

- lobbying in those states that are considering passage of public sector collective bargaining bills to minimize the impact of Yeshiva
- reaching memoranda of understanding with college administrations in lieu of collective bargaining agreements as alternative means of establishing employment relationships
- using local political forces along with economic pressure to ensure continued bargaining relationships

Though the success of these legislative and political approaches appears uncertain, predictions are that faculty groups will continue along these lines and at the same time try to obtain relief through the Board and the courts.

Public Sector Impact

The potential impact of Yeshiva on public sector collective bargaining is somewhat analogous to the relationship that exists between private and public sector labor laws. Most public employment relations boards and commissions have modeled their statutes and decisions on the NLRA, so it is reasonable to assume that if Yeshiva stands in its present form, then the public institutions could be significantly affected. If this were the case, one might expect to see a gradual erosion of faculty bargaining units that contain teaching faculty deemed to be managerial or supervisory. Most states will exclude deans and administrators and impose stricter standards for chairperson inclusion.

On the other hand, the comparative sector argument, used so long and effectively by public employees seeking the same rights as their private sector counterparts, may be reversed. It has been submitted that for the first time in the labor history of the United States greater collective bargaining rights are being enjoyed by those who work for the government than by private sector employees, and, although it seems unlikely to occur, the private sector may be asked to model itself after the public in granting collective bargaining rights. While no answers are yet in place, a wait-and-see attitude has emerged with the following questions being asked as a means of structuring the expected discussion:

- Will state public employment relations boards follow NLRB standards and erode bargaining rights for faculty supervisors and managers?
- Will the department chairpersons question result in fewer chairs being included in the unit?
- Will a new labor relations definition of academic supervisors emerge in the public sector?
- Will states contemplating legislation now take the position that Yeshiva does not warrant faculty collective bargaining and refuse to pass enabling legislation?
- Will those states that do not specifically mention college faculty in their legislation but include them in an overall employee classification now move to seek their exclusion?
- Will the situation of allowing greater bargaining rights to public employees instead of private sector faculty mark a new shift in American labor relations?
- Will Yeshiva spill over into other areas of public sector professional employment such as health care, as employers refuse to recognize or negotiate with "managerial employees"?

Future: The Yeshiva Guidelines

Much of the course of this debate in the future will depend on what stand the NLRB pursues with respect to the managerial and supervisory issues raised by the Supreme Court. If it seeks to regain and assert its acknowledged expertise in this area, it will have to respond to the message of the court. The Supreme Court chastised the NLRB in its decision:

> The Board contends that the deference due its expertise in these matters requires us to reverse the decision of the Court of Appeals. The question we decide today is a mixed one of fact and law. But the Board's decision may be searched in vain for relevant findings of fact. The absence of factual analysis apparently reflects the Board's view that the managerial status of particular faculties may be decided on the basis of conclusionary rationales rather than examination of the facts in each case. The Court of Appeals took a different view, and determined

that the faculty at Yeshiva University "in effect, substantially and pervasively operate the enterprise" 582 F.2d 698 We find no reason to reject this conclusion. As our decisions consistently show, we accord great respect to the expertise of the Board when its conclusions are rationally based on articulated facts and consistent with the Act.... In this case, we hold that the Board's decisions satisfied neither criterion.

On April 10, the Board issued a Memorandum entitled, "Guidelines for Cases Arising Under NLRB v. Yeshiva University." (see NLRB Memo 81-19, Office of General Counsel). The sixteen page document by General Counsel William A. Lubbers, sets forth a detailed analysis of the Yeshiva decision and the relevant case law that preceded it. The seminal issue of faculty status after Yeshiva, with specific reference to the 'alignment with management issue,' was the first question to be examined:

> ... As the court pointed out in its analysis, a finding that faculty members are managerial turns on the extent to which they can be said to be aligned with management.[15] In resolving this issue, the inquiry must focus initially on whether faculty members formulate, determine, or effectuate decisions of a managerial character.[16] However, even if faculty members do exercise this authority, the issue remains as to whether they do so in their own interest, rather than in the interest of the employer. Further, even if faculty members exercise such authority, the extent to which they are held "accountable" for departures from institutional policy is another factor bearing on the issue of status.[17] Finally, the percentage of time spent on exercising such authority,[18] as well as whether or not the exercise of that authority is "incidental to" or "in addition to" their primary functions of teaching, research, and writing,[19] are additional factors to be considered ...

15 Id. at 68 , citing N.L.R.B. v. Bell Aerospace Co., 416 U.S. at 286-87.

16 See N.L.R.B. v. Bell Aerospace Co., 416 U.S. at 288; Alco-Gravure, Inc., 249 NLRB 1019 (1980)

17 See Northeastern University, 218 NLRB 247, 257 (1975)(concurring opinion); Fairleigh Dickinson University, 227 NLRB 239, 241 (1976).

18 The percentage of time faculty members devote to the performance of allegedly managerial duties is a relevant consideration, since incidental or sporadic performance of such duties normally would militate against their exclusion from the Act's coverage. See Oregon State Employees Association, 242 NLRB No. 150 (1979); C. Markus Hardware, Inc., 243 NLRB No. 158 (1979); N.L.R.B. v. Dunkirk Motor Inn, Inc., 524 F.2d 663, 666 (2nd Cir. 1975); N.L.R.B. v. Doctors Hospital of Modesto, 489 F. 2d 772, 776 (9th Cir., 1973); Westinghouse Electric Corp. v. N.L.R.B., 424 F. 2d 1151, 1157-58 (7th Cir. 1970).

19 The Court noted in Yeshiva that Congress expressly approved a test in the health care context of "whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients." 444 U.S. at 690, n. 30.

Four subsequent questions, which constitute the foundation of the dual governance model, were then reviewed.

- Faculty participation in decision making...
- Do faculty members act in the interest of the employer...
- Accountability to managerial policies...
- Supervisory status of faculties...

The analysis of the aforementioned questions and issues established the foundation for the concluding portion of the Memo which sets forth those statements identified as the "Yeshiva Guidelines."

- First, it is apparent from the Court's criticism of the Board's factual analysis in Yeshiva that as complete as record as possible should be made in cases arising under Yeshiva.
- Second, although the Court in Yeshiva found the entire faculty to be managerial, decisions at Yeshiva are made primarily by the various faculties voting as committees of the whole, and the Court recognized that even at Yeshiva, and universities structured like it, there might be faculty members "who properly could be included in a bargaining unit." Thus, evidence should be adduced not only as to the faculty as a whole, but also as to the status of individual faculty members.

- Third, a determination under the above analysis that individual faculty members or groups of faculty members or chairpersons are managerial or supervisory would not necessarily result in a conclusion that the entire faculty is, for that reason, outside the Act.
- Finally, in Section 8 (a)(5) cases, if it is concluded that a handful of faculty members or chairpersons are managerial or supervisory and thus should be excluded from the unit, their inclusion would not necessarily privilege a withdrawal of recognition or refusal to bargain by the university.
- In unfair labor practice cases which are ultimately litigated, Counsel for the General Counsel should assume the burden of going forward with sufficient evidence to make out a prima facie showing that the case is distinguishable from Yeshiva University and that the faculty members are neither managerial nor supervisory.

What impact the guidelines will have on the thirty-seven "Yeshivas" that are presently litigating the matter is somewhat uncertain at this time. They are a compilation of previous Board Memos, briefs and advice and, if nothing else, should aid in the development of a consistent approach to be used by the thirty-three regional directors in adjudicating Yeshiva questions. Many observers believe that the Board merely reaffirmed its earlier position in Boston University however, in its present format the guidelines may have more significance.

Two vacancies currently exist on the Board, however, regardless of the Board's makeup, it is in the judicial arena that the next round of post-Yeshiva will be fought. The unions, in a cooperative effort and in hopes of eroding the decision are trying to establish a series of lead cases where the record indicates that the Yeshiva ninety percent rule is not applicable. As more cases are adjudicated, they will try to distinguish the issue in the hopes of narrowing Yeshiva to, if possible, that institution itself.

The cost of litigating these issues will be significant and might account, in part, for the predicted slowdown in organizing drives at previously targeted private institutions. While it is difficult to connect these points directly, it is expected that unionization at institutions such as New York University and Syracuse University will be placed on the back burner until the issues are more clearly resolved. Much will depend on the Boston University case, as it may develop into a landmark decision.

Legislation, either in the form of an amendment to the NLRA that will permit the inclusion of faculty or a new definition of academic managers compatible with the Act seems unlikely at this time. The 97th Congress does not appear to be one in which significant labor legislation supportive of the unions' position will be enacted. It also appears doubtful that organized labor will risk an entire examination of NLRA scope and coverage in order to gain support from higher education faculty unions.

Public sector legislation will be closely watched to see if the decision causes any state to either exclude faculty where coverage has not been granted or to defeat potential enabling legislation. The next such test may come in Wisconsin where a collective bargaining bill, which has been defeated in each of the past three sessions, will probably, once again, be put up for a vote in 1981. The newly enacted California law, granting bargaining to faculty in both the university and state college systems, is currently at the unit hearing and representation election stage. It is still too early to ascertain what, if any, impact Yeshiva will have. Speculation lingers about which way the California legislature might have gone if Yeshiva had come down prior to the passage of its bill.

The post-Yeshiva confusion that existed during the past year shows no signs of ending, especially if the suggestion of Supreme Court Justice Powell, that junior faculty have bargaining units separate from those of senior faculty, is enacted. No such design currently exists and observers predict that if any is created, long-established governance relationships will certainly be weakened. One other suggestion that would surely add to the confusion is the adoption of the so-called "flexible unit" whereby an individual faculty member's status will be determined by the nature of the committee(s) that he or she belongs to in any given semester. Thus, when the faculty member is on the personnel and budget committee, the exclusion rule would come into play and would remain in effect as long as the committee assignment does. No such restrictions would be placed on committee memberships that were construed to be nonmanagerial. Neither the junior faculty bargaining model nor "flexible unit" is being widely suggested; however, both remain on the list of available options.

While Yeshiva has been litigated in a labor relations environment, the central theme of the case remains the nature of faculty governance. The governance machinery at Yeshiva University was such that in over ninety percent of the deliberations, the decision of faculty committees was upheld. The perceived success of this system by the Court resulted in the faculty effectively governing themselves out of a collective bargaining relationship, one that they voluntarily sought. Is the Yeshiva message to be construed as one in which faculty organizations may lose collective bargaining rights if they are successful in having ninety percent of their decisions implemented? Surely, that cannot be the meaning of this case. On the other hand, will colleges that do not choose to bargain and implement the decisions of their faculty bodies to the degree done at Yeshiva University lay the groundwork for a managerial and supervisory claim? It seems unusual that the more successful you are in self governance, the less rights you are able to enjoy in pursuing collective bargaining employment relationships.

The "dual-loyalty" issue that colleges are raising with respect to unionization must be further studied to ascertain if models can be developed to ensure effective means of shared governance within the traditional academic setting. The fact that many institutions have both academic senates, in some cases contractually protected, and bargaining agents lends support to those who believe that not only was Yeshiva bad law, it was also poor labor relations policy. Will faculty be forced to choose between exercising their choice of engaging in collective bargaining at the expense of participating in institutional governance or will compromise solutions be reached that will preclude the necessity of this option?

Is there a new and different legal approach to Yeshiva that has yet to be developed? The briefs filed by various parties thus far appear to concentrate largely on the managerial and supervisory issues. The unions have been trying to distinguish the cases, whereas colleges have been making umbrella-like claims. One such new legal theory, though still in the embryonic stage, concerns the prohibition in the NLRA of employer interference in union activities. If faculty members have been restrained, coerced, or otherwise interfered with in exercising their statutory rights under the act, then we may see the development of a new legal hypothesis. Should the employer act in such a manner as to encourage collective bargaining and yet as a result of that action, the union is denied the right to bargain, that consequence may be subject to challenge under the NLRA. Thus, Yeshiva might in actuality mean that you do not lose the right to collective bargaining under the law. If, however, you control access to managerial and supervisory rights, then statutory protection will not be afforded. It is inconceivable to think that the Supreme Court intended to deny coverage to all faculty under the NLRA and their major concern must have been those faculty in supervisory and managerial positions.

The Yeshiva debate will rage within academe for years to come. Unions will argue that the decision, more than anything else, shows faculties that they must organize and bargain collectively, with or without the protection of the Act. Small private colleges that have either exercised or are planning to initiate Yeshiva-like claims will submit that in these times of declining enrollment and overall contraction, they cannot be burdened with collective bargaining costs and must, for their own financial survival, refuse to recognize the union.

Considering the history of managerial and supervisory employees in labor relations, it is somewhat ironic that the arena of higher education collective bargaining might be the forum in which it will be resolved. Whether the Burger Court willfully selected this case to demonstrate its new majority in labor relations or it is just a chance happening, no other case in the law of higher education employment relationships has caused such furor, confusion, and uncertainty over the future.

TABLE 4. - CHALLENGES TO BARGAINING UNIT AND REPRESENTATIONAL ISSUE DISPUTES

Institution	Issue
American International College	College exercised Yeshiva-like claim halting NLRB certification hearings.
American International	Election petition withdrawn by AAUP after university inquired into making Yeshiva-like claim.
Boston University	United States Court of Appeals for the First Circuit remanded issue of Department Chair inclusion and overall faculty coverage under the NLRA to regional NLRB for reconsideration in light of Yeshiva.
C.W. Post Center of Long Island Univ.	University agrees to withdraw Yeshiva-like claim if union admits to being unit of managerial employees.
Duquesne University School of Law	University exercised Yeshiva-like claim thereby halting NLRB certification hearings.
Livingston College	NLRB, Raleigh, N.C. rejects college's position and declares faculty not to be managerial. Election ordered to determine if faculty desire to partake in collective bargaining. Votes have since been impounded while unit determination ruling is reviewed.
Long Island University Brooklyn Center	University raised Yeshiva issue during the course of negotiations for a successor agreement. New collective bargaining agreement reached after strike. Yeshiva issue still pending before NLRB.
Ohio Northern University	Regional Director of the NLRB revokes certification of ONUFA as bargaining agent. University subsequently terminates existing collective bargaining agreement pursuant to terms of said agreement.
Saint Theresa College	Regional NLRB requests position papers from parties after Yeshiva decision although neither party has raised Yeshiva during the course of unit hearings. Decisions pending on reopening original case, which excluded certain faculty from unit.
Seattle University	AAUP withdrew representational petition after university raised issue of Yeshiva applicability.
Southampton College of Long Island Univ.	University agrees to withdraw Yeshiva-like claim if union admits to being unit of managerial employees.
Stephens Institute/Academy of Art College	College asking USSC to overturn 9th circuit court rule which held that "school did not meet definition of mature university where faculty have managerial status."
Thiel College	College exercised Yeshiva-like claim thereby halting NLRB certification proceedings.
University of Albuquerque	Regional director of NLRB supports university claim that most faculty are managerial thereby reducing an original bargaining unit of ninety-five to eight.

TABLE 4. - CHALLENGES TO BARGAINING UNIT AND REPRESENTATIONAL ISSUE DISPUTES (cont'd)

Institution	Issue
Villanova University	University raised Yeshiva-like claim thereby causing NLRB to cancel previously agreed upon bargaining agent election.
Wagner College	College exercised a Yeshiva-like claim pertaining to a unit certification proceedings while at the same time continuing to negotiate a successor agreement.
Yeshiva University	USSC affirms Second Circuit Court of Appeals which held that entire faculty at Yeshiva University were managerial and thus exempted the university from bargaining under the NLRA.

Source: NCSCBHEP research.

3. IMPACT OF RETRENCHMENT I

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If the impact of retrenchment were confined to those directly affected by it, those whose positions are terminated, it would be bad enough. The separation of a professional from an institution for reasons unrelated to the individual's worth is traumatic. The stigma attached to the separation, regardless of the wording of the letter of notification, is always negative. The pall it casts over a person's career is as dark as it is unfair. The effect on the victim's psyche is well documented. One's capacity to earn a living in a chosen profession in these days of academic contraction, which gave rise to the retrenchment in the first place, is severely limited. A career, founded on extensive educational preparation, professional commitment and some experience, is jeopardized if not ruined. Each and every case is a personal tragedy.

But it is important to remember that the impact of retrenchment extends beyond the lives of the affected individuals. The institution itself is hurt by severing from its midst members of the faculty in whom it has made substantial investments. These are faculty who have grown and developed by virtue of their service to the institution and their disciplines, whose credentials have been established by the painstaking process of peer review and administrative reappointment, and whose value to the institution and its students is thus certified. Retrenchment negates all of that, and in that degree, in each individual case, the institution is negated and becomes poorer in quality.

The impact of retrenchment on institutional policy and development is frequently overlooked or underestimated. Every retrenchment decision has a direct bearing on student access, student retention, the availability of instruction, and ultimately the breadth of the curriculum. The effect is partially quantitative--fewer students can be accomodated and a smaller choice of programs can be offered--and it is also qualitative: one program is reduced or eliminated while another is not. Retrenchment

replaces the usual process of collegial policy-making at the university, and makes instant policy. The abnormality of retrenchment creates a new departure in the institutional life of every university in which it occurs.

The retrenchment decision and the process leading up to it have extraordinarily lasting effects on institutional morale. If the deliberations are confined to a circle of administrators, the rest of the institution's community is rife with fear, suspicion, resentment and hostility. If the faculty is brought in as participants in the retrenchment decision, they are tempted to advocate their special interests, opposing colleagues in different departments and divisions, lapsing often into forms of behavior we can liken to "academic cannibalism." The insecurity and ill feeling thus generated take a long time to subside. Retrenchment as a process ends ultimately in a continuing situation of academic and intellectual diminution.

Furthermore, academic freedom, tenure and collective bargaining agreements are undermined by retrenchment. Even given the rare eventuality that the retrenchment procedure is entirely without academic fall-out, it would be very difficult to document convincingly that its victims were not selected for arbitrary, capricious or discriminatory reasons. Academic freedom may be violated by the retrenchment of professors who have spoken critically of management. Tenure may be subverted by the retrenchment of an individual with tenure or of an individual on his way to tenure through the legitimate channels. Collective bargaining agreements may be circumvented by the sanction assumed by management--in the name of fiscal emergency--to cancel the due process protections afforded by contracts.

Affirmative action is among the surest casualties of retrenchment. Existing as it does on most campuses as "soft" policy, "goals" rather than quotas or mandates, it is vulnerable to the effects of retrenchment. Recognition should be paid to affirmative action in institutional policy, and retrenchment guidelines usually contain a caveat against the abuse of affirmative action. But the fact is that the members of minority groups and the women who have most recently gained increased entry opportunities for academic jobs are the first to go as targets of retrenchment. The intent may not be discriminatory, but the outcome can be troubling nevertheless. Even more than troubling, retrenchment's impact on affirmative action is such that it often leaves the college with racial and other minority tensions th t did not exist before.

Finally, while we are not generally concerned about the fate of the world when we are embroiled in a struggle for our survival, we must consider the impact of retrenchment on the society at large. Retrenchment means the sacrifice of human capital. It gives up the rich resources of qualified professionals--teachers and researchers and scholars--and it gives up the future of those students who will be denied access to the institution. The research and technological capacity of this nation is the foundation of our successful encounter with modernity. And the demand, the national need, for college-educated professionals will not lessen. The general benefit to the society of expanded, rather than contracted, postsecondary education, is set back by widening instances of retrenchment throughout the nation.

There are buffers against retrenchment.

Tenure is a protection insofar as retrenchment guidelines generally place tenured personnel at or near the bottom of the list of categories of personnel to be retrenched, if necessary. A particular financial situation must be extremely pressing before consideration is given to the termination of tenured professors.

But the protection promised by tenure against retrenchment is not iron-clad. A fiscal exigency may, in fact, be sufficiently extreme to warrant the discontinuance of tenured personnel. Or, in any retrenchment situation, a tenured individual may be marked for retrenchment, while nontenured personnel are not, because of what are called "special educational reasons." Those reasons may be legitimate, namely, an insufficiency of students in the tenured person's department, which may threaten tenure even without retrenchment. Or those reasons may be illegitimate. For the non-tenured, of course, even for the about-to-be-tenured, the institution of tenure is by itself no protection against retrenchment.

The faculties exercise governance rights that, with varying degrees at different institutions, give them a role in the retrenchment process. Because this role, where it exists, is confined to determining how retrenchment is carried out and not to whether it should be executed in the first place, faculties do not comprise a formidable buffer against retrenchment. This is especially the case when their judgment is opposed to contrary decisions of university managers about the need to discontinue any class of employees, including professors.

The same may be said for collective bargaining agreements, for different reasons. Rarely can a contract outrightly prohibit retrenchment; the Yonkers Federation of Teachers had such a clause, and it was upheld by the courts to reverse improper firings in 1977. But for colleges and universities this example is not duplicated anywhere. In higher education, approximately 40 percent of the senior college contracts and fewer community college contracts contain retrenchment clauses. They deal largely with how, rather than whether, to retrench. In no instance does the union have the power by agreement to reject retrenchment.

Outside of the contractual process, however, faculty unions can act and have acted as buffers against retrenchment. They do so through the influence they exert over the budgetary process, both within their institutions and in the legislatures and other political bodies that are involved in the budgetary processes of public institutions. In securing funds for their institutions and in securing the restoration of funds cut from their budgets, the political muscle of faculty unions is a powerful instrument for saving jobs and for placing jobs high on the list of policy priorities.

These buffers against retrenchment, nevertheless, will not succeed in eliminating the threat. The record shows that retrenchments have taken place. Moreover, conclusions emanating from demographic projections and the reality of governmental financial constraints suggest that considerable pressures will mount in the near future which will increase the resort to retrenchment. It is sensible, therefore, to consider some means by which it may be avoided and, if retrenchment is unavoidable, its negative impact minimized.

The fundamental problem, of course, is fiscal exigency, and I will address that shortly. But from the record that has emerged from the history of retrenchment to date, another problem has surfaced that cries out for solution. That is the predilection of some academic managers to use retrenchment as a mode of reasserting their academic authority and as a "normal" outlet for institutional policy. What better pretext is there than fiscal exigency to claim for management the professional value of "flexibility" that it prizes so much? What better instrument than retrenchment for exercising "flexibility"? What better excuse can one find to dismiss professors without deference to the rigors of due process? What easier method can be devised to terminate programs that are unpopular or disfavored? And how many college administrators resist the temptation to replace expensive senior faculty with cheaper younger faculty, or with the underclass of academe, the part-timers?

The temptations for management are irresistible, and while no one need be accused of relishing retrenchment, the record is marked already by abuses.

Bloomfield College abolished tenure and dismissed thirteen faculty members in 1973 on the pretext of "financial stringency." In a suit brought by the faculty union, a New Jersey Superior Court judge found that alternatives to these measures were available to the college, such as the sale of a $5 to $7 million golf club. He cited the hiring of new professors at the time that the tenured staff members were fired, and he concluded that the college's "immediate duty is to maintain its educational programs and refrain from acts of faithlessness toward faculty members by whom it has been competently served."

In a more recent controversy, Temple University notified twenty-one tenured faculty members in July 1979 that they would be terminated on January 1, 1981 as part of the institution's efforts to maintain a balanced budget. After vigorous protests by the local AAUP union, these terminations were rescinded within three months of their issuance. The letters withdrawing the dismissals described the reversal as stemming from a new-found "flexibility" by departments in meeting college fiscal requirements. What the evidence shows is a careful assault by resourceful union leaders on the university's figures, procedures, and good will, with the union's successful challenge to the administration's actions based on its initial contention that no dismissals whatever were needed to correct any projected deficits. After retreating from an opening demand for 95 terminations to the firing of 21 professors, Temple's academic management found itself embarrassed by the union's assertion that before the instructional program was truncated by dropping tenured faculty, cutbacks might be made in expenditures for an ancillary summer music festival ($368,000) at a branch campus and the elimination of crushing losses incurred in intercollegiate athletics. Interestingly, some administrators later tried to put the best face on this unusual episode by claiming there was a "positive side" to their actions because savings were finally achieved without the extremity of retrenchment. But this "positive" outcome simply confirmed the faculty union's consistent argument that no professor had to be dismissed to meet what were termed erroneous anticipations of a fiscal emergency.

As long as the academic community remains susceptible to such abuses, we should concentrate on solutions, not surgery. Abuse of authority should not be built into the

system. The distortion of academic life does not necessarily have to flow from a fiscal emergency--unless we succumb to the tendency to yield to all of its terrible consequences.

It is essential that the retrenchment process be a collegial one. If its worst effects are realized--if retrenchments are indeed carried out--it is necessary to have established beyond a doubt that the process was unavoidable and fair.

Those ends can be accomplished, for the benefit of management as well as the rest of the academic community, if constraints are placed on the process in the case of a fiscal exigency.

These are my recommendations:

1. The college should be required to demonstrate that there is a bona fide fiscal exigency, if such is claimed. We have seen instances, such as in Bloomfield College and Temple University, where the alleged fiscal exigency that promoted the idea of retrenchment was not bona fide.

2. Management should be required to demonstrate that measures other than reductions-in-force cannot overcome fiscal exigency. That a budgetary crisis exists does not automatically mean that retrenchment must follow. Given the negative consequences of retrenchment, it should be the last option to be considered, not the first, as has sometimes been the case.

3. Management should be required to demonstrate that, if a reduction-in-force is established as necessary, it cannot be achieved through the processes of normal attrition. Non-renewals, in addition to resignations and death, reduce the payroll every year--without the shock of retrenchment. Retirement incentives can create additional buffers against retrenchment.

4. Management should work out a system by which "excess" staff may be considered for transfer or reassignment in other departments or divisions of the institution, with whatever re-training is necessary. "Excess" in one part of the institution may dovetail with "need" in another. It is unseemly for an institution to retrench and, at the same time, recruit new personnel.

5. Management should engage the faculty in the processes by which all these decisions are made. The proper sensitivity should be shown on such urgent occasions, more than ever, to such fundamental institutions as tenure and such due process considerations as timely notice and seniority.

Retrenchment is an abnormality that can easily be normalized. Because it ends to conduce to the exercise of extraordinary degrees of managerial prerogatives, academic management needs to guard against such abuse of its authority in times of financial stress.

Academic management and academic unions have a joint responsibility in face of fiscal emergencies, dropping enrollments and programmatic changes to minimize the recourse to retrenchment and to ameliorate its consequences. The assumption of that responsibility in a cooperative effort can yield alternatives far more constructive than the recourse to retrenchment.

Such positive measures are not merely wise policy. They are becoming increasingly necessary policy as the larger society, through the governments, the courts and the people who support the academic enterprise, scrutinize the actions of campus decision makers and require of them a responsible, equitable and humane conduct of their affairs. What better testament could these be to the living spirit of a university than its commitment to such values during the worst trials of a financial emergency.

4. IMPACT OF RETRENCHMENT IN HIGHER EDUCATION II

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Introduction

It seems as if every day we read of a new incident of retrenchment in higher education: from the massive faculty layoffs at CUNY and SUNY in the mid-70's where thousands of tenured faculty were let go as a result of legislative reduction in higher education appropriations to the current fiscal crisis at Michigan State where, according to a recent front page report in the Chronicle of Higher Education, hundreds of faculty--tenured and untenured--are likely to lose their jobs. From Proposition 13 to Proposition 2 1/2; from the major cutbacks in Pennsylvania's state colleges to the discontinuation of nursing program in one of Florida's state universities that failed to win accreditation.

As inflation threatens the real value of our financial support of our colleges and universities, as state legislators question their priorities that, in earlier times, provided often generous funding for higher education, as the new administration in Washington responds to the public mandate to reduce spending; and, indeed, as the population reassesses the value of a college education when more practical skills and training seem better to equip one for survival, the result is budget cuts. In a labor intensive industry, revenue shortfalls, shifting patterns of student interest and even minor changes in institutional direction are certain to have an impact on personnel.

In the early days of faculty bargaining, layoff clauses were an oddity. Considered little more than boiler plate, little attention was given to them. Management found them easy to obtain and labor traded them for items of small value. The traditional academic approach to retrenchment is represented in the 1940 and later AAUP statements providing in general terms for interim faculty review of the bona fides of the institution's claim of financial exigency.

I can remember a conversation that took place in 1922--a few years before the legislative cuts that necessitated the extensive layoffs in SUNY--in which a prominent college president expressed the belief that tenure meant the absolute guarantee of a job--even if it meant working in a library, bookstore or office.

Management Prerogatives

Conventional thinking has changed regarding the priority given a tenured member of the faculty over other employees, not only because more attention is being paid to the place of non-teaching professionals and staff in our institutions, but because unions now represent them and they have contracts that protect their employment rights against incursion by the faculty.

This thinking, by the way, reached its apex in a case involving Bloomfield College in New Jersey. When a revenue shortfall caused college administrators to discontinue some offerings and to lay off the 3 or 4 tenured faculty members who taught them, the faculty members went to federal court. The court, writing that the principle obligation of the institution was teaching, ordered the university to sell its golf course and pay faculty salaries from the proceeds. We've come a long way in our thinking since then.

There is, about the land, a myth that retrenchment may only occur as a result of--or in reaction to--external forces such as a shortfall in income, a reduction in the legislative appropriation, a voter revolt leading to a Proposition 13, 2 1/2, etc. This is, I emphasize, merely a myth. A university administration exists, among other reasons, to manage the institution; to direct and guide the enterprise; to define its mission, aims, goals, scope, means and ends. Now, I'm not making these up; and I didn't read this listing in some management manual on "What to do when a union organizer knocks on your door?" This listing is taken from state laws all over the country including New York City's municipal labor ordinance, the laws of California, Wisconsin, Pennsylvania, Hawaii, Florida and many more. These rights and other similar ones have been constantly reinforced in the courts and PERBs around the country. These sources define not only the legal authority of management, but also the expectation society in general holds for institutional managers. The authority to mold, shape, aim and direct, redefine, expand and contract the institution--i.e., to define its mission--cannot be abdicated.

Any restrictions on the exercise of management's authority sought by employee organizations at the bargaining table should be resisted. Such restrictions are not, in

themselves, mandatory subjects of bargaining and may not be insisted upon to impasse by the union. The decision to retrench is management's alone. Whether to have a graduate program in oceanography, to offer languages, to have an inner city or suburban campus are examples of defining the mission of the institution.

Retrenchment Criteria

While the decision to retrench may be mangement's alone, the impact of such decision on working conditions must be negotiated. Of course, the negotiations and agreements reached may have a persuasive effect upon how and, occasionally, whether the retrenchment occurs. For example, suppose the agreement provides that retrenchment must take place on a department-wide basis, that all non-tenured faculty must be let go before any tenured faculty. Under such a provision it would be virtually impossible in a department of language and literature, to abolish literature and retain languages. It is unlikely that all of the tenured literature faculty are junior to the language faculty and no language faculty are untenured. The contracted provision deprives the institution of the alternative of keeping French language instruction but foregoing French literature.

Occasionally, in an effort to address this problem, management negotiates a last-in, first-out order of retrenchment so long as the more senior persons are "qualified" to perform the tasks remaining after the dust has cleared. On its face, this would seem to make sense. I'm reminded, however, of an arbitrator in a New York State community college in 1970 who, when faced with such a clause, determined that the more senior professor of European history was qualified to teach American history. After all, he reasoned, history is history.

The point of these examples and this exposition is that the insititution must preserve the right to retrench by function or program--not by some irrelevant organizational unit such as a department, college or school. That would seem to make as much sense as retrenching by alphabetical order.

An additional important consideration is the impact of retrenchment by reverse order of seniority, even by program, on the affirmative action program. Since the female and minority employees are likely to be the ones most recently hired, they would be the first to go under such a provision. To meet this problem, many agreements provide an exception to a strict last-in, first-out rule. In the Pennsylvania state college, for example, female and minority employees are considered in separate categories from white males for retrenchment purposes. Retrenchment then takes place proportionately among the three groups so that no one category is disproportionately affected.

Retrenchment by Function

Preserving the right to retrench by function or program follows from the administration's right to determine the mission, programs and offerings of the institution. That right is hollow if the retrenchment clause makes it impossible to discontinue French literature as an offering if you must lay off all the linguists first.

Preserving the ability to retrench by function or program does not mean that you must retrench in this manner. You may be well advised--if the cuts are not deep or are temporary--to "share the wealth," i.e., cut across the board. If, however, the cuts are deep or permanent, the most humane and, I believe, successful from the point of view of the survivors, is to cut out entire offerings or programs and limiting the cuts to those areas. While retrenchment is always traumatic for an institution, the survivors are less likely to be required to cope with the continuing effects of the cuts: such as increased workloads, a shortage of clerical assistance, as constant and daily reminders of the knife.

Similarly, having the unilateral ability to make cuts and actually doing so unilaterally are two different things. My own experience leads me to the conclusion that consultation with the union is important in dispelling rumors and giving the unions the information it needs to represent its constituents. Nevertheless, the union would be unlikely to seek an active role in actually determining the functions or programs to be cut or in exercising any discretionary authority of management. The union's role is to bargain at the table and then to police the agreement to be sure that management is fulfilling its obligations and the employees are receiving their entitlements under the agreement.

In a related note, I believe that collegiality works least well when dealing with adversity. I recall a circumstance in SUNY where the president appointed a faculty committee to recommend departments to be cut. Represented on the committee were Physics, English, Engineering, Philosophy and Botany. The recommendations were--you guessed it--to put all programs except those in Physics, English, Engineering, Philosophy and Botany.

Sharing information is one thing, sharing the power to decide is quite another.

Impact Bargaining

I stated earlier that while the decision to retrench is not required to be negotiated, the impact on working conditions is a mandatory subject of bargaining.

What is that impact?

Conceptually, any change in an employee's terms and conditions of employment must be negotiated with the union.

The question of seniority as it bears upon the selection of employees who will be laid off is clearly negotiable. What is meant by seniority also is. Seniority determined by what date? The date of original appointment to the university? To the department? To the current assignment? How are leaves of absence to be handled in determining seniority?

What about bumping rights? Shall there be rights to displace another faculty member? How are bumping rights determined? Shall bumping be limited to functions the more senior faculty member has satisfactorily performed? Or expanded to those for which she/he is qualified (or can become qualified)? Can a professor of European history bump the American Historian?

It is wise to keep in mind that selection of faculty members to be laid off is a balancing of the obligation of the institution to present the most effective program on the one hand with the institution's obligations to its employees on the other. To quote Arvid Anderson pragmatically "retrenchments are most likely to result in some diminution of quality."

Any complete retrenchment clause should address the issue of fringe benefits. Continuity of health insurance--perhaps in payment for unused sick leave; payment for accrued leave; the college's right to require employees to take such leave prior to layoff. If employees are entitled to be paid for such leave, the cuts may have to go deeper because of these "hidden costs."

Should the department, program or function have the option for all faculty members to go on a part-time basis--thereby sharing the cut equally but so that no one loses a job?

What about early retirement options that may save money for the institution by replacing an employee's current salary with a retirement reserve? This is an area not fully explored by many colleges and universities.

Sabbaticals may be put to good use. If the institution has already budgeted for sabbaticals, first priority may be given to laid off faculty members who wish to retrain or renew unused skills so as to be able to work in other programs or functions.

This brings to mind the entire question of preferred hiring generally. The agreement should address the question of whether a greater obligation is owed to one's current (or soon-to-be former) employees beyond the general obligation to prospective employees. This factor must be considered when deciding how to fill a vacancy in another area. Arvid Anderson's observation has equal application here.

The agreement should prescribe what happens to tenure held and current salary. Do they carry over or must the faculty members requalify for tenure or be paid in accordance with the new department's salaries?

The agreement might provide, in addition to the ordinary remedial grievance for a contract violation, provisions for a declaratory statement to advise the parties of the appropriateness of proposed action.

Finally, the question of <u>when</u> a grievance may accrue should be answered--is a layoff notice grievable at the time it is received, or at separation?

5. THIRD PARTY INTERVENORS IN CONFLICT RESOLUTION

Robert Coulson
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A university should be expected to use dispute resolution processes, just as it is expected to provide playing fields and libraries. It needs mediators and arbitrators as much as it needs coaches and librarians.

The alliance between education and the resolution of conflict is obvious. Personal participation in dispute settlement is educational. Without being involved in controversy, education may not even take place. Without conflict, the academic experience seems arid, purposeless, perhaps fraudulent.

Educators can bring unique skills to dispute settlement. Teachers are mediators, or should act as mediators, serving their institution as well as their students. A mediator must demonstrate that a resolution is more valuable than an impasse. This requires persuasion and learning.

A mediator must exercise the same skills and resources that teachers bring to a classroom: information, experience, insight, verbal skills, credibility and integrity. A mediator must help parties to understand and overcome their disagreement, just as a teacher assists students to encompass a body of knowledge. The parties' search for a settlement is not unlike a student's struggle to gain an education.

In the preliminary stages, the mediator must establish a relationship of trust. Like an educator, the mediator must open the parties' minds, must lead them around their prejudice and ignorance, guiding them towards a settlement. The mediator must nurture the parties' relationship; warn them away from an impasse by helping them to realize that an agreement is not only possible, but desirable. A teacher's ability to explain, to listen, to inspire - in short, to educate - are totally relevant to the mediation process.

Such an approach lends a strong, positive value to mediation, in striking contrast to the sullen image contained in my assigned title: THIRD PARTY INTERVENORS IN CONFLICT RESOLUTION. If ever words were calculated to raise your hackles, THIRD PARTY INTERVENOR must be those words. An outsider: a THIRD PARTY. A divisive, threatening meddler: an INTERVENOR. I reject that title: THIRD PARTY INTERVENOR.

Promotion and tenure are a prime cause of conflict in the academic world. Many arbitration cases involve that issue. A struggle between departmental committees and the administration is often involved.

The University Model

I understand that a university is a self-contained community, populated by ambitious intellectuals seeking rewards that seem logical to them, if obscure to me. Whether a member of the faculty, a student or an administrator, each individual has enlisted in the avowed academic mission of exploring the complex precincts of the mind; in theory, a community of scholars. Tranquility should prevail.

Unfortunately, even selfless scholars suffer twinges of ambition and desire which set them at odds with their peers and with the institution. Human conflicts arise: claims, grievances, demands, both individual and collective, assertions of right and petitions against unjust actions. Disputes occur and must be recognized and resolved.

Our customary settlement process is what our Chinese friends call "friendly discussions." The claimant identifies a grievance, spots someone who can do something about it, and initiates a conversation with that person. Face-to-face negotiations provide our primary mechanism for resolving disagreements.

Most of us would agree that universities, in particular, should encourage negotiations, as being in harmony with the academic goal of encouraging verbal abilities and mutual exploration of problems by colleagues. Scholars should be happy to examine the dimensions of a disagreement, to engage in the thoughtful task of creating acceptable solutions. In such an effort, education and dispute settlement should intervine.

Unfortunately, a college student with a beef may not even be able to discover which administrator is available to discuss the problem. Doors are not always open; the attitude of free and open inquiry not always present.

Nor is an ombudsman always available to guide a grievant through the institution's procedures. Too often, a student must search out which faculty member or assistant dean is willing to listen, or is capable of doing something about the problem. Only a few institutions have formal grievance procedures to provide prompt and effective review for students.

Faculty Complaints

A similar lack of process is evident for faculty complaints. In recent months, Jane McCarthy, my colleague at the Center for Mediation in Higher Education, has been evolving model procedures for faculty grievances. First, she studied the procedures now in place in various universities. Then, she designed a "better grouse trap." The Center's recommended procedures should be useful to colleges that want to modernize their faculty grievance process. They insure fair and effective results, providing accessibility, simplicity and an opportunity for independent review. The procedures encourage informal attempts to settle disputes. Neutral faculty members can serve as mediators to encourage informal settlements. If no solution can be found, arbitration provides an impartial review procedure to resolve appropriate issues.

The Center's model procedures reflect the views of faculty and administrators who have worked with academic grievance systems. Each provision has been examined to test its practical application. Managerial needs have been weighed against the faculty member's rights and expectations.

Universities are searching for better ways to handle controversy. The courthouse is not the best forum for cases involving higher education. Neither the faculty member nor the institution relish the costs of litigation. In any case, the hostilities generated by litigation are incompatible with the positive collegial relationships which universities require.

Litigation is episodic, tedious, expensive and involves the intervention of outside attorneys. Parties are subject to being ordered about by judges whose professional background is far from academic. Courts are familiar with commercial business, with criminal affairs and with government regulations. They are not familiar with the tribal practices of higher education. Most educators would prefer some other tribunal for academic disputes.

For some universities, the labor model provides an acceptable alternative. Collective bargaining, with union representation and grievance arbitration, has provided protection and dignity to many American workers. I will not do an autopsy on the Yeshiva case: its complexities have been dissected by experts. Enough to say that in many universities, the labor-relations model is not available as a mechanism for faculty grievances.

While the Yeshiva case has inhibited the unionization of faculty members, unions continue to organize maintenance workers, plant engineers and clerical workers. Even universities that have escaped unionization have often adopted formal employee relations programs.

At one time, universities followed an authoritarian mode, with centralized power at the top and narrow delegation to administrators and department heads. This management approach is less popular. University presidents now realize that they can no longer claim exclusive authority, and have modernized their personnel procedures and policies.

Wage schedules, fringe benefits and working conditions are described in a comprehensive employee manual. Whether or not employees are members of a union, they will be working under some document that describes their rights and duties. College administrators are becoming reconciled to such procedures.

Universities as Employers

Universities were once regarded as prestige employers. Clerical workers were proud to work there. On the other hand, maintenance and service workers often took jobs at colleges because they were unable to obtain higher paying jobs in other fields. These twin attitudes of prestige and desperation made it possible for some colleges to neglect the basic needs of their workers.

Now, the employment attitudes of college employees have hardened. Universities find it more difficult to play upon people's concern for respectable employment. Blue collar workers are increasingly aware of comparative wages. Service employees know their worth.

Higher education is labor intensive. Moreover, college employees tend to be affiliated with interest groups, allied by departmental loyalties, attached to professional associations or labor organizations. Tenured faculty, instructors, researchers, librarians, administrators and nonprofessional staff work within one institution. Students work there too. Often, these people collide, touching off conflicts which lead to grievances. A professor demands prompt service from the library, overlooking work rules. Service workers insist upon their coffee break, delaying service. The head coach gives orders to everyone. Sparks ignite the community, requiring administrators to devote inordinate attention to the employee's problems.

In this milieu, with its high potential for conflicting interests, expedited dispute settlement procedures should be attractive. Employees represented by a union will have an arbitration clause in their contract. It may be swamped with cases. There are several characteristics of the campus scene that encourage the use of grievance arbitration.

Higher education includes various categories of employees, with vast differences in prestige. The roster may contain a high percentage of females and minorities, often assigned to relatively impotent, lesser paid positions. Management actions as to these workers may lead to claims of discrimination. Such cases are expensive to litigate and are bad for employee morale. They may result in lengthy class litigation or destructive publicity for the institution. Worse still, involvement in such proceedings can deflect college administrators from concentrating upon the primary purpose of the institution -- providing an education to students. These kinds of issues should be resolved internally.

In transit from authoritarian management, supervision may be ill-prepared to comply with the responsibilities contained in a collective bargaining agreement or a comprehensive employment relationship. Also, in universities, authority must sometimes be shared between faculty members and administrative staff, complicating the chain of command and increasing the potential for conflicts and disputes. When controversies involve academic issues, faculty committees may have to participate in the decisional process. In some institutions, joint committees are used. Impartial arbitration sometimes permits an administrator to avoid becoming embroiled in such controversies. Internal conflicts should be resolved internally.

Educational institutions provide personal services. They rely heavily on their staff to carry out the mission. The quality of education depends greatly upon faculty attitudes. Cheerful employees, going about their work with a sense of security based upon a fundamental faith in the institution's climate of employment justice, are a critical element in creating a learning environment. A college, above all, should be concerned with resolving employee disputes promptly, with fairness and informality. Again, internal remedies are indicated.

In institutions where unions have won the right to bargain, they have demanded arbitration. Management has conceded that provision across the table. There are indications that such a right may be extended to nonunion employees. A recent Conference Board survey of complaint procedures for nonunion workers in a variety of fields contains some clues to the future:

- Nine out of ten employers had formal procedures for handling the complaints of unorganized employees.
- Nearly one-quarter of the employers were revising their procedures or had recently done so.
- An increasing number of universities and hospitals were installing an impartial review procedure.

Nonunion Employees

With respect to most fringe benefits, employers treat union and nonunion employees with an even hand; but there is one benefit that most nonunion employees do not receive: they do not have access to grievance arbitration. This may change. A University of Michigan survey indicates a growing unwillingness among employees to accept capricious management decisions. If nonunion, academic workers realize that just cause and arbitration are being withheld from them, they may demand it. Some universities are already offering it.

If a college already has a formal grievance system, it is relatively easy to add the option of impartial review. For nonunion employees, universities should consider expedited arbitration. Here is how such a system might work: an employee would first discuss the grievance with the immediate supervisor. The supervisor must respond promptly. If the answer is not satisfactory, the employee would present the grievance in writing. The supervisor must answer in writing. If the supervisor's answer does not

settle the matter, the employee files the grievance with the personnel administrator. After consultation, personnel provides the employee with a final decision.

At this point, under the AAA's Expedited Rules, a request for arbitration might be filed. It should be in writing, signed by the employee, and delivered to the personnel office for processing. A prompt hearing can be held at the college before an impartial arbitrator appointed by the American Arbitration Association. No briefs or transcripts would be necessary. The arbitrator would hand down a short decision within five working days after the hearing. This represents a simple, inexpensive arbitration procedure.

Arbitration allows the personnel department of the college to take itself out of the case, leaving the grievance in the hands of the employee and first-line supervision. With the help of an arbitrator, the people who caused the dispute are involved in its resolution.

Litigation is the worst way for a college to decide employee grievances. In addition to being expensive, employee lawsuits have become difficult to win. The termination-at-will doctrine which once protected employers seems to be eroding, as court decisions reverse conservative judicial attitudes. Recent cases have been swinging towards the worker. If a termination violates a public policy, or impinges upon an employee's personal rights, sanctions may be imposed upon the employer.

For example, a recent decision against Blue Cross-Blue Shield of Michigan resulted in a substantial jury award to an employee who testified that he had been assured that he would only be fired for good cause. A nonunion nurse at a Shriners Hospital in Spokane won another award because the personnel procedures stated that after a few months, an employee became a regular employee, imposing a duty on the hospital to prove just cause. A line of cases in California has established a theory of unjust discharge, with both compensatory and punitive damages.

Colleges are not exempt from such liabilities. "Just cause" liability for nonunion academic workers is on the horizon. Universities may decide to use arbitration, to insure that such issues will not be decided by juries.

Many other potential controversies are peculiar to academia: issues involving freedom of speech, censorship, privacy, compliance with civil rights legislation, social policy of the institution, whistle blowing and many others. Here again, the courts may be the worst and least attractive forum to decide such matters. Moreover, these kinds of issues are so interesting, so vital, that it would be a shame not to make them part of the academic experience.

Economic pressures have become intense in higher education. Inflation, particularly as to salaries and plant maintenance, is exerting pressure on colleges at the same time that student revenue is eroding. For example, a recent arbitration involved the allocation of summer courses among the regular professors. There was not enough work to go around. The grievant had received one summer course but claimed that he had a right to two under the contract. How should a college deal with such an issue? I suggest that one answer is mediation.

Faculty members with a bent towards problem solving can be trained to mediate to help cope with allocation problems within the academic community.

Mediation agencies offer training seminars at reasonable cost. Faculty members and administrative staff can benefit from the experience. The college will also benefit.

To encourage mediation and arbitration, a college should provide recognized auspices under which neutrals can perform. If an institution has not created such a structure, it should do so. The college should identify mediation as an approved procedure, give recognition to the role that faculty mediators are expected to play in that process, encourage them to participate in dispute settlement as empowered persons. Mediators should be recruited from within the institution, to avoid any imputation that the university has failed to develop its own human resources. The university must convince parties that their interests can be presented in mediation without endangering their professional reputation or relationships. Mediation and arbitration should be annointed by the academic community. This is exactly why I am appealing to you today.

6. JUDICIAL PROTECTION OF ACADEMIC FREEDOM IN HIGHER EDUCATION
THE AFTERMATH OF ROTH AND SINDERMAN

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Tenure in higher education serves two purposes. One is job security. The other is protection of academic freedom. The freedom to express and exchange ideas in the search for truth is more important in the university, the great marketplace of ideas, than it is anywhere else in our society. Individual freedom of speech is protected from governmental interference by the First Amendment of the United States Constitution.[1] Individual freedom of speech is protected from private interference by contract. The courts did not create these rights. We did that. The courts enforce the rights we create by our ability to fashion and amend our constitutions, federal and state, to cause legislation to be enacted, and to enter into individual contracts and collective agreements.[2] Today we will look at the state of the law as it impacts on academic freedom in the public and private sectors. We will see that educators in the public sector enjoy greater protection of academic freedom than many of those in the private sector. More importantly, we will explore ways in which these protections can be increased.

The courts don't grant tenure.[3] They don't substitute their judgment of a teacher's competence for the judgment of educators.[4] Perhaps we should be thankful that they don't, especially if the Supreme Court's 1972 decisions in Board of Regents v. Roth[5] and Perry v. Sindermann[6] and its 1970 decision in NLRB v. Yeshiva University[7] are an indication of how well the judiciary understands higher education. My remarks today will focus primarily on the aftermath of Roth and Sindermann, but before we review those cases, I would like to make one observation. If we, as educators, are critical of the courts' decisions in the area of higher education, perhaps we should assume greater responsibility for educating lawyers and judges about our workplace, the campus, so that their arguments and their decisions will more closely reflect the expectations of higher educators and more fully protect the principles which are the foundation of higher education. The most essential principle is academic freedom.

Freedom of Speech

Let us consider the following hypothetical fact pattern. A professor has been teaching at the university for four years on a series of one-year probationary contracts. He is in a tenure track position which requires that the tenure decision be made in the sixth year. His annual evaluations have been satisfactory. He has never been apprised of any shortcomings. He has been promoted once. During his fourth year, he makes statements in faculty meetings which are critical of university policies and privately complains to an administrator. Shortly thereafter, his contract is not renewed. No reasons are given.

If the university were a public institution, the professor would have a cause of action based on the First Amendment of the United States Constitution. Until 1977, a showing that his speech was a substantial or motivating factor for nonrenewal would have caused him to prevail.[8] The Supreme Court has clearly established that a university may decide not to renew a contract for no reason at all, but the decision cannot be tainted by substantial infringement of a First Amendment right.[9] In 1977 the United States Supreme Court in Mt. Healthy Board of Education v. Doyle held that after the teacher shows that his speech was a motivating factor in the decision not to renew his contract, the institution then has the opportunity to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected activity.

The rationale for adding a second prong to a First Amendment test is that a teacher who is undesirable should not be able to hide behind the First Amendment to protect his job. Although First Amendment rights were violated in Mt. Healthy, the constitutional principle at stake, the Court said, is sufficiently vindicated if a teacher is placed in no worse a position than if he had not engaged in the protected conduct. The Mt. Healthy test dilutes the protection of academic freedom through the First Amendment. The professor no longer prevails by a showing that his speech was a motivating factor in his nonretention. If the university's allegations that it would not have retained the professor even in the absence of his speech are really pretextual, the professor must come forward with evidence to rebut the university's proffered reasons and hope the court will perceive the pretext.[10]

For those among us who find it difficult to believe that a university would use pretext to rid itself of a professor whose exercise of free speech offended certain administrators, the case of Cooper v. Ross[11] may be persuasive. In 1979 a federal district court in Arkansas found that Professor Cooper was not renewed primarily because he expressed his political beliefs in the classroom as well as in public. The court rejected the university's allegations that Professor Cooper's performance as a teacher and scholar was unsatisfactory. The court based its decision on the following evidence: during the previous three years when Professor Cooper had been reappointed, he had not been advised of any serious dissatisfaction with his teaching and two months before he expressed his controversial views, he had been rated average or superior as a teacher. The court ordered that Cooper be reinstated to his position as Assistant Professor without tenure and awarded him backpay and attorney's fees.

Since the United States Supreme Court's decision in 1979 in Givhan v. Western Line Consolidated School District[12] that privately expressed criticism also enjoys First Amendment protection, our hypothetical professor's private communications with an administrator would also be protected. In the same year, the Court of Appeals for the Seventh Circuit applied Givhan to a similar situation involving a professor at Indiana State University.[13]

Had Professor Cooper or our hypothetical professor taught at a private institution, whether tenured or not, he would have had no cause of action based on the First Amendment of the Constitution. Only a contractual right to a hearing in such circumstances could have protected him. The Constitution does not protect private employment.

Although professors in the public sector are Constitutionally protected, their need for a tenure system is not obviated. In a cause of action based on the First Amendment, the burden of proof is on the professor. In a cause of action based on breach of the contractual right to tenure, the burden of proof is on the institution to show that the nonrenewal was for good cause. Who has the burden of proof can determine the outcome of the case. For example, if the evidence is evenly balanced for both parties, the party with the burden of proof will lose the case. Therefore, a tenured professor could, where the evidence is evenly balanced, prevail in a breach of contract action but lose a First Amendment claim.

Even where a tenure system exists, the courts are reluctant to question peer review and the judgment of administrators regarding teaching competence. The courts have repeatedly observed that the field of higher education, more so than any other field, is probably least suited to judicial supervision.[14] The courts will, however, enforce the tenured professor's right to whatever safeguards are provided by contract or statute. The remedies most frequently granted are an institutional hearing and damages where nonrenewal was unlawful. In a few cases, reinstatement has been ordered.[15] In the private sector, the courts look to contractual provisions which usually provide that dismissal of a tenured professor be for good cause and that he be informed of the reasons for his dismissal and provided an opportunity for a hearing to rebut those reasons. In the public sector, the Constitution requires a hearing for a tenured professor facing dismissal. That right stems from the Fourteenth Amendment's protection of life, liberty, and property which the state shall not deny without due process of law.[16]

What constitutes liberty and property for the purposes of the Fourteenth Amendment was explored in the public sector cases, Roth and Sindermann. Wisconsin State University did not renew Professor Roth's one year, tenure track appointment. Because no statutory or administrative standards for re-employment were in effect, the Court concluded that the decision not to retain Roth was in the "unfettered discretion of university officials."[17] Although by rule the Board of Regents permitted the president to grant review in a case of nonrenewal, the review would be informal and advisory only.[18] Absent, a showing that his liberty interest, his ability to seek other employment, had been harmed, he was not entitled to a hearing. The mere fact of nonrenewal, the Court said, is not a liberty protected by the Fourteenth Amendment. Because the state, through the actions of the university, had not made public the reasons for nonrenewal, no stigma could attach to Roth which would harm his opportunity for other employment.[19]

Addressing the issue of whether Professor Roth had a property interest protected by the Fourteenth Amendment, the Court explained that an abstract need or a desire for continued employment or a unilateral expectation of continued employment was not a Constitutionally protected property interest.[20] Tenure would satisfy that requirement. What the Supreme Court did not understand is that a tenure track position is understood throughout higher education to carry with it a bilateral expectation that successful job performance is likely to result in tenure, that professors are persuaded to remain at an institution based on this expectation, and that tenure should not be

denied to a professor who has never been put on notice of any shortcomings which may result in a denial of tenure. The Supreme Court did not distinguish such a tenure track position from adjunct, part-time, one year non-tenure track positions, or one year visiting professorships, none of which carries with it the generally accepted expectation of renewal. Furthermore, it does not appear that that argument was ever presented to the Court for its consideration.[21]

If a decision not to renew a non-tenured professor's contract ought to be subject to review, then the right to a statement of reasons and a hearing must be established by statute or by contract. Such a provision will be enforced when expressly contained in the employment contract and may be enforced by implication under contract law when the rules or by-laws of the institution provide for such a right.

In Ofsevit v. Trustees of California State University[22] the Supreme Court of California implied such a right into the professor's contract. More importantly, the case illustrates that procedural due process is needed to protect a non-tenured professor's academic freedom. Professor Ofsevit was employed by San Francisco State University during 1970. His department committee on retention recommended reappointment. The administration apparently determined to purge the department of Ofsevit, an active AFT member. The acting dean recommended nonrenewal. The department committee reaffirmed its recommendation. The vice president refused to renew the contract. Ofsevit filed a grievance. After a formal hearing in January of 1972, a year and a half after he was informed of nonrenewal, the grievance committee decided in favor of Ofsevit and refuted all the university's evidence that Ofsevit was incompetent. In March of that year then President Hayakawa rejected the committee's recommendation and stated that Ofsevit's "activities and, hence, his possible contribution to polarization within the department...was an element which lessened his overall value to the department."[23]

Ofsevit appealed to the Chancellor who appointed a review committee. That committee unanimously recommended reappointment to repair professional damage done to Ofsevit when unsubstantiated innuendos contained in a letter were widely distributed to department faculty, a practice outside the normal procedures for personnel matters. The Chancellor refused to abide by the committee's decision, arguing that after the grievance was filed, the rules of the university were changed to make the decision of the review committee advisory only. During Ofsevit's period of employment, the rules provided that the decision of the Chancellor's review committee would be binding. Ofsevit filed suit in December, 1973, seeking enforcement of the rules in effect during his employment and hence enforcement of the committee's decision.[24]

In 1978 the Supreme Court of California affirmed the trial court, holding that Ofsevit was entitled by contract to have the committee's decision be binding. Ofsevit was ordered reinstated with backpay from 1970, when he was wrongfully terminated, to the date of the court order in August of 1978.

I submit to you that the interests of higher education will best be served when both tenured and tenure track professors enjoy academic freedom. Ways have been found to protect the academic freedom of both while preserving the distinction between the tenured and the non-tenured. In this endeavor West Virginia has pioneered.[25] The Supreme Court of Appeals of West Virginia on December 19,1978, rendered a landmark decision in Mc Lendon v. Morton.[26] The Board of Regents of that state had adopted a policy bulletin which established objective criteria for appointment, promotion, tenure and termination of employment of professional personnel. A procedure was established whereby a professor who is eligible for tenure may apply for tenure. In addition to objective criteria for eligibility, subjective evaluation of the professor's professional skills was required. The court held that "satisfying the objective eligibility standards for tenure gave Professor Mc Lendon a sufficient entitlement so that she could not be denied tenure on the issue of her competency without some procedural due process [which necessitates] a notice of the reasons why tenure is not extended and a hearing with an opportunity to submit evidence relevant to the issues raised in the notice."[27] Two issues would be determined at the hearing: "whether the objective eligibility standards of full-time teaching employment, rank and time in service have been met [and] whether the adverse decision with respect to...teaching competency was arbitrary and capricious or lacked any factual basis."[28]

The existence of objective criteria for tenure eligibility was critical to the court's finding a right to minimal due process for Professor Mc Lendon.[29] Where such objective criteria are totally lacking, as in Roth, the decision whether to rehire is presumed to be in the sole discretion of management.

One year after the Mc Lendon decision, the West Virginia legislature broadened due process protection for probationary faculty while preserving the distinction between them and tenured professors. Whereas Mc Lendon provided for a hearing only when a

probationary faculty member is denied tenure, the legislature provided that reasons for nonretention, even before the year of the tenure decision, be given to the affected faculty member upon request. The non-retained faculty member is entitled to a hearing before an unbiased committee of the Board of Regents or a hearing examiner. The decision must be rendered within thirty days after the hearing ends, and a finding in favor of the faculty member will result in retention for an additional year. The critical distinction between the rights of such a probationary faculty member and the rights of a tenured faculty member facing nonrenewal is that the former has the burden of proving that the decision not to renew was arbitrary or capricious or without a factual basis[30] while the latter has no such burden. The institution has the burden of proving that nonrenewal of a tenured faculty member's contract is based on good cause.

The other Supreme Court decision of 1972 whose aftermath bears review is Perry v. Sindermann. In that case the Court dealt with a college professor who had taught in the Texas state system for ten years and was dismissed for insubordination, although no official reasons were communicated to him. His college had no formal tenure system, but instead had an unusual provision in its Official Faculty Guide that each professor should consider himself permanently tenured "as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors and as long as he is happy in his work."[31] The Court held that the combination of Sindermann's years in service and the informal tenure system meant that he had de facto tenure which was a property interest entitling him to a hearing under the Fourteenth Amendment. This de facto tenure, an implied contractual right, existed said the Court, because "[e]xplicit contractual provisions may be supplemented by other agreements implied from the '[institution's] words and conduct in the light of the surrounding circumstances.'"[32]

Numerous attempts have been made based on this de facto theory to provide professors with a right to a hearing. The de facto argument has not met with much success. Where the institution has an express tenure system, de facto tenure is usually not recognized.[33] The Courts of Appeals for the Sixth and Seventh Circuits, however, view a formal tenure system as not necessarily precluding the existence of de facto tenure.[34] Similarly, a federal district court in Maryland refused to dismiss a case on the grounds that de facto tenure cannot exist alongside an express tenure system.[35]

Although the broad concept in Sindermann that the institution through its words and conduct may have given the professor an interest in continued employment that would support a right to a hearing before termination, we should note that in Sindermann the professor's belief that he was entitled to a hearing stemmed from his reliance on a rule recognized by the governing board of the institution that all faculty were to consider themselves tenured. If a professor claims a right to a hearing based on his reliance on promises from a department chairman or dean that tenure will be achieved by merely serving on the faculty for a number of years and that the granting of tenure is a mere formality, that claim will probably fail because department chairmen and deans lack authority to grant tenure.[36]

Instances in which de facto tenure seems to have been achieved primarily occurred in those few institutions where no affirmative act of granting tenure was required or where a professor was not timely notified that tenure would not be granted.[37] The result, however, in those instances was not that the professor had acquired a right to reinstatement with tenure, but that he had acquired the right to a hearing and, if he prevailed, damages.[38]

The granting of tenure should require an affirmative act, following several years of meaningful evaluation designed to improve the effectiveness of the professor. No professor should be surprised by a decision to deny tenure. He should be aware of his strengths and weaknesses and assisted in the development of effective teaching on at least an annual basis. Reasons for disapproval should not be hidden from him. This means that probationary teachers must have notice of what is expected of them as they proceed along the track leading to tenure. Periodic written evaluations would increase the quality of instruction at the institution, protect faculty from arbitrary reasons for discharge and probably help them achieve tenure. Once tenure is granted, continued peer evaluation would encourage further productivity of the faculty. Written evaluations and documentation of matters such a participation in academic affairs, regular meeting of classes, and scholarly publications should be part of the institution's uniform record-keeping system. This record should be communicated to the faculty member and could serve as an evidentiary basis should the question of dismissal for cause arise.

At a time when we see numbers of students diminishing, faculty being retrenched, thousands more teachers wanting to enter the profession than the profession can accommodate, there is no excuse for a university tenuring a mediocre professor. The

granting of tenure should be a solemn occasion which gives recognition to excellence, not one which entrenches mediocrity.

Unfortunately, in our time of financial crisis administrators and faculty alike are attacking the tenure system. Administrators who would abolish it because they claim they have been unsuccessful in supporting "for cause" dismissals cannot in good faith blame the tenure system. Perhaps they should blame themselves for not building a record of evidence that would withstand judicial scrutiny. Faculty have been known to give up a tenure system in return for long-term renewable contracts. Those who have acquiesced at the bargaining table or informally in this arrangement may have been motivated by a fear of the up-or-out aspect of traditional tenure. This practice of accepting tenure substitutes undermines academic freedom. A five-year contract is no different from a one-year contract in that neither safeguards academic freedom. From the day the contract begins, any faculty expression which offends the institution can be used as a reason for nonrenewal at the end of the contract term because at that point no reason need be given for nonrenewal. This system has a chilling effect on freedom of expression.

As you return to your campuses, whether you are faculty, administrators, or union representatives, it is my hope that you will return with one common resolve. Examine your evaluation process. Design it to safeguard academic freedom from the worst kind of administrator you can imagine--he may become your department chairman, your dean or your president. Design it to safeguard academic freedom from peers who have the least to gain from speaking freely; put tenured faculty only on your peer review committees. They are more free than the non-tenured to speak and vote on the merits without undue influence of administrators who seek to insinuate themselves into the peer evaluation process. Establish substantive and procedural rights and the courts will enforce them. Since higher education is a big business administered increasingly by businessmen rather than academicians, the primary responsibility for preserving academic freedom rests with the faculty. Our common resolve must be to renew our commitment to academic freedom which was succinctly described almost thirty years ago in these words, "It is essential that the man hired to traffic in ideas not be fired for doing so."[39]

FOOTNOTES

1. The First Amendment provides in pertinent part that "Congress shall make no law. . .abridging the freedom of speech." U.S. Const. amend. I.

2. Courts will determine whether a college acted in good faith or whether it acted in an arbitrary or irrational fashion. Gray v. Canisius College, 430 N.Y.S. 2d 163, (App. Div. 4th Dep't 1980).

3. But see Kunda v. Muhlenberg College, 621 F. 2d 532 (3d Cir. 1980) (a sex discrimination suit brought under Title VII in which for the first time a court ordered that plaintiff who was denied tenure on the sole basis that she had not received an advanced degree should be awarded tenure upon receipt of that degree).

4. See e.g. Faro v. New York University, 502 F. 2d 1229 (2d Cir. 1974); Johnson v. University of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977); New York Institute of Technology v. State Division of Human Rights, 40 N.Y. 2d 316, 386 N.Y.S 2d 685, 353 N.E. 2d 598 (N.Y. 1976) (the Commission was assumed to have the power to grant tenure but decided this was not an appropriate case for the exercise of that power. Such a remedy was deemed too broad for a professor who was denied an opportunity to qualify for tenure on the basis of her sex). Courts will not question substantive criteria for non-renewal. They review evidence to support those criteria to determine whether the evidence is substantial. e.g. Raney v. Board of Trustees, Coalinga Junior College District, 48 Cal. Rptr. 555 (Dist. Ct. App. 1966).

5. 408 U.S. 564 (1972).

6. 408 U.S. 593 (1972).

7. 444 U.S. 672 (1980).

8. See e.g. Cohen v. California, 403 U.S. 15 (1971); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

9. Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (1977); Perry v. Sindermann supra, note 6.

10. The Mt. Healthy test was adopted by the National Labor Relations Board in August, 1980, in Wright Line, 1980 CCH-NLRB 17,356. This test is now used in unfair labor practice cases based on §§8(a)(3) and (1) of the National Labor Relations Act which protects employees from interference and discrimination in the exercise of their rights under §7 of the Act. The test has also been used in a discriminatory discharge case arising under the Occupational Safety and Health Act, Marshall v. Commonwealth Aquarium, 469 F. Supp. 690 (D. Mass.), aff'd, 611 F. 2d 1 (1st Cir. 1979).

11. 472 F. Supp. 802 (E.D. Ark. 1979).

12. Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).

13. Eichman v. Indiana St. Univ. Board of Trustees, 597 F. 2d 1104 (7th Cir. 1979).

14. Faro v. New York University, supra note 4; Carr v, Board of Trustees of University of Akron, 465 F. Supp. 886 (N.D. Ohio E.D. 1979); Labat v. Board of Higher Education of City of New York, 401 F. Supp. 753 (S.D. N.Y. 1975).

15. Some courts will grant relief only when retaliation against protected activity results in discharge from employment, (Morey v. Independent School District, 312 F. Supp. 1257, 1262 (D. Minn. 1969), aff'd 429 F. 2d 428 (8th Cir. 1970) (denial of usual and customary scheduled salary increases). Other courts have held that relief may be given when a condition of employment, such as denial of salary increase and retaliatory transfer, has been altered in retaliation for exercising First Amendment rights (McGill v. Board of Education, 602 F. 2d 774, 780 (7th Cir. 1979)) and Jervey v. Martin, 336 F. Supp. 1350, 1354 (W.D. Va. 1972).

Whether damages may be awarded the wrongfully discharged or wrongfully disciplined professor depends not only upon his prevailing on the merits but also upon a showing that the state has waived its sovereign immunity from suit under the Eleventh Amendment. Thus in Skehan v. Board of Trustees of Bloomsburg State College, (590 F. 2d 470, 485-96, 1978), the United States Court of Appeals for the Third Circuit ruled that the college, as agent of the state, was not liable for back pay but could be ordered to reinstate the professor with the pay status he held when the allegedly wrongful discharge took place. This injunctive relief was supported by the Third Circuit as a means of enabling the college and the professor to use the procedures guaranteed by contract to determine whether the discharge were warranted.

16. The Fourteenth Amendment provides in pertinent part that "[n]o State shall...deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

17. 408 U.S. at 567

18. Id. n.4.

19. Id. at 573. Some courts have granted a hearing in the absence of total deprivation when accusations that the teacher was morally unfit were made public (McGhee v. Draper, 564 F. 2d 902 (10th Cir. 1977)), or when allegations that the teacher suffered from a serious mental disorder harmed the opportunity for future employment (Lombard v. Board of Education, 502 F. 2d 631 (2d Cir. 1974)), or when the teacher was accused of being racist (Wellner v. Minnesota State Junior College Board, 487 F. 2d 153 (8th Cir. 1973)). The courts are reluctant, however, to grant a right to a hearing for nonrenewal of a nontenured professor when the reasons for nonrenewal are based on the teacher's incompetence. Thus in 1979 a federal district court for the Northern District of Ohio held "even if [the professor] could prove that the allegations of his teaching incompetence have foreclosed his teaching employment prospects, it would not prove that his liberty interests have been infringed. [He], therefore, has no protected liberty interest." (Dee Swain v. Board of Trustees, 466 F. Supp. 120, 124 (1979)). One caveat should be offered at this point: should the allegations be defamatory, a common law action would lie against the institution if it made known to the public false statements which damaged the professor's reputation. (Bishop v. Wood, 426 U.S. 341 (1976); Lieberman v. Gant, 474 F. Supp. 848 (D. Conn. 1979)). The Ninth Circuit has held that a teachers liberty interest was not infringed by the statement that he was not "a good enough overall teacher and scholar to merit retention." (Jablon v. Trustees of the California State Colleges, 482 F. 2d 997, 1000 (1973)). Similarly, the Sixth Circuit did not grant relief when a teacher was nonrenewed because he failed "to meet minimum standards in his professional relationships with individual students." (Blair v. Board of Regents, 496 F. 2d 322, 324 (1974)).

20. 408 U.S. at 577.

21. Note, 83 W. Va. L. Rev. 99 (1980).

22. 148 Cal. Rptr. 1, 582 P. 2d 88 (1978).

23. 582 P.2d at 90.

24. The reasoning that rules concerning tenure and right to hearing in effect at the time of employment are implied in contract and are therefore, vested rights may be helpful in cases where tenure is abolished. Arguably tenure cannot be withdrawn at will once it is granted. Therefore, abolition of a tenure system should be prospective only. But see Rehor v. Case Western Reserve University, 42 Ohio St. 2d 224, 331 N.E. 2d 416 (1975), cert. denied, 423 U.S. 1018 (1975) where a change in the retirement system affected tenure rights and Drans v. Providence College, 383 A.2d 1033 (R.I. 1978). A tenured professor could be discharged after a hearing for failure to pay agency shop fee despite provisions of the state tenure act, Detroit Board of Education v. Parks, 98 Mich. App. 22, 296 N.W. 2d 815 (1980).

25. The Governor of New York vetoed similar legislation in 1978 (Senate Bill 9124-A, Disapproval Memorandum #24, undated) and in 1979 (Senate Bill 1067-A, Disapproval Memorandum #4, May 15, 1979). The Governor "singled out certain arguments: giving reasons would create an expectation of continuing employment and would lead to the testing of academic judgement in court; it is vital to preserve staffing flexibility prior to the award of tenure; and passage of the bill would remove the issue from the collective bargaining realm." E. Liebert, "Faculty Accountability--Reality or Fantasy?" Campus Bargaining in the Eighties, National Center for the Study of Collective Bargaining in Higher Education and the Professions (1980).

26. 249 S.E. 2d 919 (W.Va. 1978).

27. Id. at 925-6.

28. Id. at 927.

29. See Goss v. San Jacinto Junior College, 588 F. 2d 96 (5th Cir. 1979).

30. W. Va. Code §18-26-8c (Cum. Supp. 1980).

31. 408 U.S. at 600.

32. Id. at 602.

33. See e.g. Davis v. Oregon State University, 591 F. 2d 493 (9th Cir. 1978); Haimowitz v. University of Nevada, 579 F. 2d 526 (9th Cir. 1978); Longarzo v. Anker, 578 F. 2d 469, 471 (2d Cir. 1978); Willens v. University of Massachusetts, 570 F. 2d 403 (1st Cir. 1978); Papadopoulos v. Oregon State Board of Higher Education, 511 P. 2d 854 Or. 1973), cert. denied, 417 U.S. 919 (1974).

34. Soni v. Board of Trustees, 376 F. Supp. 289 (E.D. Tenn. 1974), aff'd, 513 F. 2d 347 (6th Cir. 1975) cert. denied, 426 U.S. 919 (1976) and Eichman v. Indiana State University supra note 13.

35. Steinberg v. Elkins 470 F. Supp. 1024 (D. Maryland, 1979).

36. See Hansen v. Colorado School of Mines, 599 P. 2d 928 (Col. Ct. of Ap. 1979).

37. See e.g. Sawyer v. Mercer, 594 S.W. 2d 696 (Tenn. 1980) where the Supreme Court of Tennessee construed language in Faculty Guide that teachers "will at expiration of such probationary period have permanent tenure" unless notice is given within ten days afer expiration of the first semester as meaning that Professor Sawyer received tenure by default because Bryan College failed to notify him during the notice period that the contract for the following year would be terminal.

38. See e.g. La Temple v. Wamsley, 549 F. 2d 185 (10th Cir. 1977); Chung v. Park, 369 F. Supp. 959 (M.D. Pa. 1974); Bruno v. Detroit Institute of Technology, 51 Mich. App. 593, 215 N.W. 2d 745 (1974).

39. York, The Legal Nature of Academic Freedom (1953).

7. LIVING UNDER THE CONTRACT I
THE TECHNIQUES OF COLLECTIVE BARGAINING CONTRACT ADMINISTRATION IN HIGHER EDUCATION

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Introduction:

It was 1970 when I stood being fingerprinted by a burly police officer. I wasn't going to jail, just being processed as a new faculty member at Florida State University. Behind me in line a quiet young man patiently waited looking very odd wearing a baggy 1955 style business suit, fedora, and old-fashioned galoshes.

I saw him again two years later when he asked me, a grievance representative of the new union, to save his job. He said his chairperson had called a meeting for the next day to fire him (the meeting considered recommending giving him notice for non-renewal). He claimed he sought help everywhere, from colleagues, administrators, and the professional association with little result. He came to the union as a last

resort. This wasn't exactly flattering us but that was the usual client that sought out our grievance committee in 1972.

The young man look bewildered, but he managed to clearly outline his perception of his problems. They typified other cases I would soon handle. I tried to take down verbatim his description of the situation. My edited notes read as follows: "Even before I arrived at FSU my chairman explained that this is a publishing institution--that I would have to 'turn the stuff out.' In two years I've published more, in the same period, than anyone in the department. I have several articles and a book in print, a major monograph virtually complete, and a multi-volume work underway. My teaching is fine even though they assigned me a course outside my area of expertise. It was difficult on me and on my students, particularly the first year. But that's behind me, and now I have a load of DIS students which must mean something. Frankly, I don't know what they wanted from me. I've never been told of any problems, and now they're kicking me out." Of course this is how the grievant saw it. My notes reflect the drastically different viewpoint of those making the decision concerning his academic life. "Yes, he has published plenty but it's not what we want him to be working on.... He's not ready to be doing multi-volume works.... We hear he's a lousy teacher.... He just doesn't fit in....could never be one of us."[1]

In this situation, prior to our collective bargaining contract, even if the aggrieved faculty member was entirely correct in his interpretation of the events, it is likely he would have failed in correcting such negative decisions. In the Florida State University System an aggrieved employee could present a case before a faculty committee; but they never had any power other than to make a recommendation to the university administration which ultimately held responsibility for the action which caused the grievance in the first place. The aggrieved employee could retain an attorney and appeal to a state hearing officer, but once again the result was recommendation to the university administration.[2] Litigation, a final option, took years, a small fortune in lawyer's fees, and rarely succeeded.[3] In essence, the integrity of this system depended upon the employer being honestly objective, non-political and consistently fair. One publication described it as the fox guarding the hen house.[4]

It was clear that many employees with personnel problems believed they needed and deserved a better grievance system. When State University System professional employees in Florida chose collective bargaining in March, 1976, a more objective alternative became available to them.[5] Now State University System employees who believe that an administrative decision, perhaps in violation of the collective bargaining contract, has adversely affected them may file a formal grievance.

The heart of any contract securing employee rights, the grievance procedure, is seen by the United Faculty of Florida (UFF) as the tool to compel administrators to uphold their end of the bargain. The contract negotiators established binding arbitration as the final step of the grievance procedure. The union sees arbitration as inducing management to act fairly because the process is final and binding on both parties. Management sees the process in a very similar perspective. As a Florida State University System labor relations coordinator wrote, "the grievance procedure, then, introduces the element of accountability into contract administration, with the administration being held accountable, through ultimate review by a neutral, for providing the benefits which have been granted in the agreement."[6] The grievance procedure works so well that seldom do grievances go to arbitration before a neutral third party.

Participants Perceptions:

A number of common problems or attitudes (as distinguished from specific violations of a contract) across the nation, as well as in Florida, help generate grievances or impede their settlement. Some problems arise from management, others from labor. One of the most important is the attitude of university administrative officers (especially presidents and academic vice presidents or other chief executive officers) towards unionization. Being largely unfamiliar with collective bargaining, and often hostile, these officials sometimes misjudge both management and union status under the law and under the collective bargaining agreement. Presidents and academic vice presidents tend to see the union as simply a new and unwanted factor, indeed as an intruder, into their exclusive preserve. They do not often understand that "the union is a new administrative entity in the system;"[7] namely, that it too is now an integral part of the educational structure. Being unknowledgeable regarding the nature and function of faculty unions, such upper level academic officials also, at first, almost universally fail to understand the union's role as an advocate of faculty rights obtained at the negotiating table, and as an agency bringing about change.

Lacking, this fundamental perception, presidents and vice presidents also may misinterpret the union's role, usually mandated by law, in the handling of

grievances.[8] Having emerged from the traditional graduate school and having followed typical patterns of academic advancement, administrators are often shocked by the adversarial nature of contract administration. Where a manager for General Motors would be well aware that arbitrators have consistently upheld a union grievance representative's right to vigorously defend contractually guaranteed rights,[9] academic bureaucrats often recoil in horror indicating concern about "lack of professionalism." For, in addition to not comprehending that an advocate role is part of a union's nature and legal responsibility, academic managers do not realize that the extent and virulence of the union's adversarial characteristic will, in large part, be determined by management's own actions. If the administration refuses, either in fact or in rhetoric, to recognize the legal and contractual legitimacy of the bargaining agent, or refuses to resolve legitimate problems, then that administration guarantees exactly the hostile attitude it deplores.[10] If concerns "about the misapplication of industrial models to higher education" are not to become self-fullfilling prophecies, then academic managers must realize that faculty unions are a legitimate part of the college or university environment.[11]

Within the Florida State University System, administrators at an older university have been the most reluctant to accept the union's presence. The grievance arena reflected this tendency. Management repeatedly supported elements of the Association of University Professors (which, although defeated in the state-wide election, had unusual strength at this institution) in their attempt to negate the spirit of the grievance article by fostering a faculty senate grievance process. Although the collective bargaining contract does not expressly prohibit faculty senate designees from representing the university in grievances, it is clearly not what the negotiators at the bargaining table had in mind. The union, however, had enough of its members elected to these committees to harass the administration--in effect to punish the university president for failing to grant meaningful recognition to the local chapter--if the union decides to do so.[12]

Administrators would understand that grievances exist in a political framework which they ignore at the risk of otherwise avoidable union hostillty, bad publicity in the local press, and increased workloads.[13] Regrettably, both nationwide and in Florida the average president, or other responsible executive officer, does not appreciate the new realities collective bargaining has engendered. Rather than removing obvious problems or creatively using the grievance process as a source of information about and control over lower level bureaucrats,[14] administrators all too often withdraw within a fortress mentality and wait for a dramatic legal confrontation (e.g., in the form of a precedent setting arbitration or of an unfair labor practice complaint).

These misunderstandings and apprehensions emerge more clearly once the grievance process addresses sensitive personnel decisions such as a promotion, tenure, termination, and evaluation for purposes of merit pay raises. Because a union contract often guarantees faculty rights and delineates both criteria and procedures for personnel actions, academic managers (whether chairperson, dean, vice president, or chief executive officer) have to face the challenge of justifying subjective judgments.[15] In particular, administrators may have to present, perhaps for the first time in their careers, detailed and contractually defensible reasons for their actions relating to their faculty. To their great dismay, they discover that they can no longer assert that a faculty member is being let go because some time in the future they plan to "upgrade" the program or department.[16]

Administrators intitially responded to this challenge, in Florida as elsewhere, by retreating behind the shield of "academic judgment," not realizing that this very tactic will often force an arbitrator to investigate the very area the administrator wants most dearly to keep sacrosanct: decision making power. For by failing to settle meritorious faculty grievances, such administrators help generate the large grievance case load which will ensure that this prerogative is called into question at arbitration.[17]

Grievance Processing:

Academic officers in Florida have also frequently failed to understand that arbitrators have already ruled that not every decision administrators make is an "academic judgment" and therefore removed from the arbitrator's scrutiny. Administrators must now substantiate their actions.[18] This new burden of proof is often times not merely a surprise but also an overwhelming and troublesome obligation.[19] They are further discomforted with the discovery that their failure to meet the procedural requirements of contractually specified personnel actions may also result in a grievance which will be sustainted at arbitration.[20] The recent experience in the State University System of Florida has been that such lessons are not easily learned. For example, although arbitrators have repeatedly determined that there exists what is known as a "continuing grievance" (i.e., one whose actions or results proceed over a long period of time), this issue had to be decided in the union's favor

at arbitration after three years of collective bargaining experience by Florida academic managers.[21] It is also difficult for the average university bureaucrat to realize that arbitrators have ruled that neither party to a collective bargaining agreement can unilaterally decide when a contract violation has occurred.[22] Since the grievance procedure is a continuation of the process that began at the bargaining table, bilateral negotiations must continue allowing each party to make its representations fully until they may finally arrive at binding arbitration before a neutral umpire. Certainly no campus administrator, even a president as has been the case in Florida, may declare a faculty member's grievance not to be such and therefore to refuse to process that grievance.[23] Thus administrative attitudes, in Florida and elsewhere, will in great part determine whether the transition to collective bargaining will be painful or a peaceful adjustment entailing advantages to both management and labor.

A union may even recruit grievances. This occurred in the Florida State University System immediately after the collective bargaining election and is symptomatic of an immature collective bargaining relationship (i.e., a new, struggling union confronted by a hostile, largely unknowledgeable administration). A grievant one day is a union member the next, and often an activist within a short period of time. As the UFF grievance manual put it in advising grievance teams in the early stage of unionization, "A grievance committee becomes an organizing vehicle as well. Non-union faculty receiving union aid will usually join the organization, and often they will become dedicated members...."[24] But the result may overload the grievance process with a large number of dubious cases.

The Florida Experience

Another general problem affecting grievance processing grows out of the quality and authority of those bureaucrats, on both sides, who handle grievances. With all the difficulties associated with contract administration and with the grievance process fraught with so many potential misunderstandings, the positions of management's contract officers (or contract administrator or assistant to the president for collective bargaining, etc.) assume particular importance. Not only students of higher education but also the more perceptive of chief executive officers have pointed out that the choice of this individual "may prove to be one of the most important administrative decisions" taken after collective bargaining becomes a fact.[25]

Unfortunately, the experience in Florida, as elsewhere, has been that campus administrators have reluctantly, if at all, recognized the critical nature of this position. This has resulted in contract officers who are sometimes not highly knowledgeable and competent in the field. Although the academic collective bargaining literature agrees that experience and training are absolutely necessary in this post,[26] the trend in Florida--perhaps reflecting the reluctance with which collectve bargaining has been recognized--has been to make stop-gap appointments. In Florida this has produced a new type of bureaucrat whose authority other academic managers cannot identify in the university hierarchy (which might not have been the case had they been given more traditional titles such as "dean," "provost," etc.). Yet the contract officers must educate adminstrators to the realities of collective bargaining and their legal responsibilities.

Of special concern in the Florida System, and again running counter to the advice of higher education specialists and the more knowledgeable of campus presidents, has been the lack of support given these contract officers. If the legally mandated grievance procedure is to work smoothly and if the adversarial nature of the relationship is not to become unnecessarily embittered, the union grievance representative must see the adminstration as acting responsibly in upholding management's prerogatives. Above all else, the adminstration's contract officer must have the support of the chief executive officer and must have the authority to handle grievances (i.e., to issue decisions which have the support of the president or other administrator in charge subject only to the accountability required of any bureaucrat).[27] Without such authority the contract administrator cannot fulfill the obligations of the office and will likely be perceived by the union as engaging in "bad faith bargaining." In such an instance the all too frequent results are *ad hominem* argumentation and a more violent expression of the adversarial character of the grievances process, but with the adminstration now being confronted in the press or before the appropriate legal body.

Union personnel also affect the process. Although the union is sometimes dismayed by divisions in management's ranks and reacts hostilely to the contract officer who cannot deliver obvious and reasonable remedies, likewise management has problems with union grievance specialists who sometimes differ with elected officials. For example, union officials frequently wish to publicize grievance "victories" in order to generate new members. The grievance specialists just as often disagrees, and asks "if every time the union saves someone's job, it shouts about it, won't the administration become more reluctant to make the next deal? If the union publically decries every deadlock, will

management consider this bad faith and be more difficult to deal with?"[28] This sometimes results in union grievance specialists assuring management that the union will not propagandize a settlement favorable to the grievant, and then find themselves overridden by the political leadership of the union.

Grievances are also affected by union strength, or lack of strength. We have previously pointed out that grievances in the Florida State University System have evolved away from political influence, but politics still has its role. The 1979 Florida legislature made it possible for a single university to withdraw from the bargaining unit. UFF, then, may have to contest a decertification attempt at one or two universities in the system.[29] Is it coincidental that UFF filed a system-wide grievance that most observers feel is political in intent at the same time a rival organization began a decertification campaign?[30] Like the management contract officer, the union grievance specialist is both restrained and channelled by others with concerns that go beyond the resolution of the problems of contract administration. Thus, the weaker the union, the more intransigent it may be in the grievance arena.

Both union grievance representative and campus administrator should understand that the assertion that the grievance process is a continuation of the negotiations which began at the bargaining table is not a mere rhetorical flourish. For by altering and continuously monitoring the traditional decision making processes in academia, the grievance procedure "has the potential for changing higher education relationships even more than initial bargaining."[31] Indeed, one of the most experienced and insightful academic managers in this area has commented that "Often, more managerial authority is lost in the process of administering the contract than was negoitated away at the table."[32]

Clearly both sides have faced institutional, political, and attitudinal impediments in resolving problems and settling grievances. Yet grievances have had a marked impact on Florida State University System management at all levels. For example, the contract calls for faculty and professional employees to accept annual assignments of responsibilities. Since they are eventually evaluated on the basis of these assignments, employees (in the union's view) should insist on acceptable assignments. The contract indicates that assignments should take into consideration employee qualifications and preferences, and most importantly cannot be arbitrarily or capriciously imposed. One person's assignment cannot significantly differ from an equivalent employee's assignment unless the difference is academically justified. The supervisor should make assignments with care, but the employee may have to grieve if he or she feels the assignment is unreasonable.[33]

Employees who believe a supervisor has written an improper negative evaluation may file grievances. On the other hand, if to prevent grievances and avoid unpleasantness, a supervisor does not identify an unsatisfactory employee's faults and, on the contrary, gives that employee a positive evaluation, the administration would be hard pressed subsequently to defend any future attempt to deprive the employee of promotion because of unsatisfactory performance. Supervisors, as a result of the grievance procedure and the collective bargaining contract in Florida, must manage their departments responsibly. They must carry out the unpleasant aspects of decision making that low level academic managers seemed to prefer to avoid, or face the negative consequences of losing grievances and keeping unwanted faculty. The academic manager can be a rigorous taskmaster and still be contractually correct, but to ignore or violate the contract will result in grievances the administration will lose.

If the employee is given a negative evaluation or receives a negative personnel decision, the Florida Board of Regents/United Faculty of Florida collective bargaining agreement requires the administration at various levels to provide reasons as well as counselling on how to improve. Before the contract, management ignored this kind of standard personnel procedure. In one grievance prior to the advent of collective bargaining in Florida, for example, a department chairperson admitted that he never informed the grievant of research expectations, did not indicate to the grievant that he did not perform his work satisfactorily (until the grievant's non-renewal), and never suggested how he could improve. The chairman argued that the employee should have understood such specific employment expectations through "academic osmosis." Under the current grievance procedure in the Florida State University System, faculty and professional employees no longer need be confronted by such a lack of administrative professionalism.

However, the collective bargaining contract and the grievance mechanism have certainly not produced a perfect system and future contracts, the union contends, will further strengthen employee rights. Yet, overall, UFF officials believe arbitrary decisions by powerful administrators, who previously disguised their authority by picking and choosing from committee recommendations, are no longer possible or as prevalent in many areas that affect the academic community in Florida.[34] Management

now has collectively bargained contractual obligations to each faculty member and professional employee. Union grievance specialists see to it that the administration fulfills the responsibilities embraced at the bargaining table. Employee rights are more often protected now than in the past, although at the expense of considerable vigilance and perhaps of aggressive conduct. This is what the grievance mechanism in the contract, spelled out in Article 20 of the United Faculty of Florida/Florida Board of Regents collective bargaining agreement, is all about.

Summary:

Such examples provide some insight into the atmosphere of the grievance process in the Florida State University System. For the record, here is how the contract has worked overall according to a 1979 UFF study carried out by one of this article's authors for internal union purposes. More than six hundred grievances had been filled by the United Faculty of Florida and faculty and professional employees in the State University System in order to secure rights and privileges under the United Faculty of Florida Board of Regents contract.[35]

Filed during the three year period beginning October 1, 1976 (the date of implementation of the first collective bargaining agreement in higher education in Florida) and ending in June 1979 more than four hundred of these six hundred grievances have been resolved to the satisfaction of the employee at the first step of the grievance procedure (the department, college, or university level).

Of the one hundred and fifty one grievances that went to the Step Two level (the Florida Board of Regents), all but eleven were resolved or not pursued further. The eleven remaining cases were resolved at Step Three through binding arbitration before a neutral umpire. The total number of complaints filed and the number resolved at the first step of the grievance process is testimony that the contract is enforceable and that the union, faculty, and professional employees are making the grievance procedure work to guarantee employee rights. It is also a tribute to the increasingly mature relationship between management and labor in the State University System.

The purpose of the grievance process, then, is to resolve disagreements and disputes arising out of violation of faculty contractual rights and to do that at the lowest possible level: not to attain "justice" or to change the world. The majority of formal and informal complaints at the first level centered around evaluations, duty assignments, and the awarding of merit (i.e., discretionary salary increases). Of the one hundred fifty-one grievances at Step Two, contract Article 6 (non-discrimination, including many salary inequity cases) was cited thirty-one times, Article 9 (assignment of responsibilities) was cited thirty times, Article 12 (reappointment) was claimed twenty-seven times, Article 14 (promotion procedures) was invoked twenty times, while Article 15 (tenure procedures) was called into play eighteen times.

Major changes resulting from the impact of the grievance mechanism in the Florida State University System in the enforcement of the contract include: fairer evaulation of faculty, promotion based on specified assignments and responsibilities; precedent setting arbitration ruling protecting academic freedom; and the establishment of some control over faculty and professional employee workloads.

Any discussion of grievances, in some respects, gives a false impression. Although a grievance system by its very nature is adversarial, problems have been resolved because cooperation serves both sides better than confrontation. Both management and union would rather work out solutions (and prevent further complications of the same sort) than face the uncertainty of arbitration. Moreover, to exist together in reasonable accord in the long run means some compromise and good faith bargaining of immediate issues of mutual concern. In addition, the union's pursuit of strict enforcement of contractually guaranteed personnel practices often emulates precontract university procedures and state statutes which had been ignored in practice previously. Such was the case in Florida. It is in the interest of upper level management for lower level administrators to utilize sound personnel practices. This may mean that managers must be restrained on occasion. In the Florida State University System lower and middle level managers have been experiencing Kellogg Foundation funded training (administered by both management and union personnel) in an effort to minimize unnecessary grievances.[36] Likewise, the union, not wanting to perpetuate incompetence among its representatives and clientele, has allowed their participation in conferences on personnel practices (e.g., annual evaluation sponsored by the Florida Board of Regents). Thus both sides in the collective bargaining arena pursue agreement and not arbitration whenever possible.

In the Florida State University System the grievance process is far from perfect and undoubtedly will be improved in subsequent contracts. Management still needs more understanding of the new realities under collective bargaining. If the administration

consistently provided sophisticated contract officers, possessing real authority to deal with the questions at hand, the system would certainly work better. Likewise, if the union pursued only those grievances it considered likely to be meritorious when handled by experienced grievance specialists, functioning as true professionals in the collective bargaining environment, the process would be much smoother and perhaps less abrasive. Yet, on balance it has worked well. Of over six hundred grievances reaching Step One (and many more were resolved informally before this stage was attained) only eleven have reached binding arbitration. Practically none were withdrawn. Thus, settlements acceptable to both management and labor resulted in an overwhelmingly large number of grievances. Both the United Faculty of Florida and the Florida Board of Regents--along with their respective constituencies--have been "victorious."

[1]In the event referred to, Neil Betten, one of the authors, represented the grievant. The notes cited are in possession of the authors.

[2]See, for example, FSU Faculty Handbook, 1975, or Rules of the Department of Education, Board of Regents, Chapter 6 C-5, Systemwide Personnel Matters, Subsection 6 C-5.08; For general background of higher education grievances see: Maurice C. Benewitz & Thomas M. Mannix, "Grievance Procedure in Higher Education Contracts," Community and Junior College Journal (December/January 1974/1975): 22-24; Merton C. Bernstein et. al., "Arbitration of Faculty Grievances: A Report of Joint Subcommittee A and N," AAUP Bulletin, LIX (Summer 1973): 168-170; Tracy H. Ferguson & Bergan, "Grievance Arbitration Procedures and Contract Administration," "Journal of College and University Law I (Summer 1974): 371-391.

[3]In one of Florida's most publicized litigations involving a state university grievance preceding collective bargaining, legal costs amounted to approximately $25,000 (in 1973 dollars). It was carried to the 5th Circuit Court of Appeals which ruled against the faculty member.

[4]Alan Tucker, et al., The Institute for Departmental Leadership, pp. iv.-2. This workshop manual, currently in manuscript form, will be published as Departmental Leadership and the Academic Chairperson.

[5]For the best study of the organizing campaign in the Florida State University System, see James M. Fendrich, "Unions Help Faculty Who Help Themselves: A Partisan View of a Collective Bargaining Campaign," The American Sociologist 12 (1977): 162-175.

[6]James Parry, "Grievance Processing: A Management Perspective," in Neil Betten and William O. Oldson, Contract Administration: From Grievance to Arbitration Tallahassee: UFF/Florida AFL-CIO Publications, 1978, p. 101.

[7]W. Todd Ferniss, "Grievance Procedures: A Working Paper," American Council on Education, (August 1975) p. 25

[8]See Jean T. McKelvey (ed.), The Duty of Fair Representation (Ithaca: Cornell University, 1977).

[9]Frank Elkouri & Edna Asper Elkouri, How Arbitration Works, 3rd ed. (Washington: Bureau of National Affairs, 1978), pp. 138-40.

[10]Joseph J. Orze, "Conflict Resolution in Academe: Prevent or Settle Early," Special Report #34 (May 1978), Academic Collective Bargaining Information Service, pp. 1&3. At the time of publication, Dr. Orze was President of Worcester State College in Massachusetts.

[11]Orze, "Conflict Resolution in Academe," p. 5.

[12]Florida State University Faculty Senate document on committee appointments, May 28, 1980.

[13]Orze, "Conflict Resolution in Academe," p.2.

[14]Orze, "Conflict Resolution in Academe," p.6; Satyrb, "The Art of Settling Grievances: A Study in Campus Conflict Resolution," p. 3. At the time of publication, Dr. Satryb was Assistant Vice President for Business Affairs of the State University College, Geneseo, New York.

[15]June Miller Weisberger, Grievance Arbitration in Higher Education: Recent Experiences With Arbitration of Faculty Status Disputes, Academic Collective Bargaining Information Service Monograph #6 (Washington, 1978).

[16]Weisberger, Grievance Arbitration in Higher Education, pp. 4 & 11.

[17]Harold Levy, "Academic Judgment and Grievance Arbitration in Higher Education," Special Report #20 (April 1975), Academic Collective Bargaining Information Service, pp. 1 & 4

[18]Joseph J. Orze, "Faculty Collective Bargaining and Academic Decision Making," Special Report #24 (September 1975), Academic Collective Bargaining Information Service, p. 9; June Weisberger, Faculty Grievance Arbitration in Higher Education: Living With Collective Bargaining, Institute of Public Employment Monograph #5, New York School of Industrial and Labor Relations (Ithaca: Cornell University, 1976), p. 14.

[19]Weisberger, Faculty Grievance Arbitration in Higher Education, p. 21.

[20]Weisberger, Faculty Grievance Arbitration in Higher Education, p. 16 & 26.

[21]Elkouri, How Arbitration Works, pp. 152-3; United Faculty of Florida Board of Regents (Arbitrator William P. Murphy; October 10, 1979.

[22]Elkouri, How Arbitration Works, p. 158.

[23]This has occurred on several campuses in the early stages of the collective bargaining relationship.

[24]The original publication appeared in 1974 in mimeo and has been reprinted in Betten & Oldson, Contract Administration: From Grievance to Arbitration, p. 85.

[25]Orze, "Conflict Resolution in Academe," p. 8.

[26]Elkouri, How Arbitration Works, p. 110.

[27]Furniss, "Grievance Procedures: A Working Paper," pp. 11 & 19; Satryb, "The Art of Settling Grievances," pp. 4 & 7; Orze, "Conflict Resolution in Academe," pp. 8 & 10.

[28]Memorandum from Neil Betten to UFF President Kenneth Megill (April 1976), United Faculty of Florida Files, Florida AFL-CIO Building, Tallahassee.

[29]See Florida State University AAUP literature for February 1980 through June 1980 in United Faculty of Florida Files, Florida AFL-CIO Building, Tallahassee.

[30]United Faculty of Florida system-wide sex discrimination grievance v. Florida Board of Regents (filed separately on all nine university campuses), Summer 1980.

[31]Weisberger, Faculty Grievance Arbitration in Higher Education, pp. 10 & 39.

[32]Naples, "Preparing to Negotiate the Next Contract," p. 432.

[33]Agreement Between Board of Regents, State University of Florida, and United Faculty of Florida 1978-1981, Article 9, pp. 6-9.

[34]Betten & Oldson, "Grievances and the Workplace," p. 8.

[35]The following data is based on United Faculty of Florida Files and is summarized in a report dated July 10, 1979 from William O. Oldson (then Director of Grievances and Arbitrations) to United Faculty of Florida President Kenneth Megill, 12 p.

[36]Although the final research report is not yet completed, both labor and management observers consider the project highly successful. For training details see Alan Tucker, et. al., The Institute for Departmental Leadership, currently utilized in manuscript form.

8. LIVING UNDER THE CONTRACT II
THE UNIVERSITY OF MAINE EXPERIENCE

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University of Maine Structure

The University of Maine is a public institution of higher education governed by a fifteen (15) member Board of Trustees and comprised of the Office of the Chancellor, a unit providing system-wide services and seven (7) campuses. As of fall, 1980, 27,000 full-time and part-time students were enrolled at the University of Maine at all its campuses and outreach centers. Approximately 4,150 full-time regular employees are currently employed by the system, including approximately 1,100 faculty who are represented by a collective bargaining agent.

The Associated Faculties of the University of Maine (AFUM), affiliated with MTA/NEA, was prepared on July 1, 1976, the effective date of the University of Maine Labor Relations Act, with a petition to establish the faculty unit. The unit stipulated by the parties included all full-time regular faculty having the rank of lecturer, instructor, assistant professor, associate professor, professor and corresponding cooperative extension service ranks. Some department chairpersons were included while others were excluded depending upon the extent of the administrative responsibility of each. The election was conducted in May, 1978 and approximately 85% of the unit faculty turned out to cast their ballots. Of the faculty voting, slightly less than 60% of them voted for AFUM and that labor organization was certified as the collective bargaining representative of the faculty unit by the Maine Labor Relations Board.

The Contractual Grievance Procedure

The principle mechanism for discussion and resolution of disagreements between employees and the University, or AFUM and the University, is the parties' contractually established grievance procedure. Grievances are defined as unresolved complaints arising during the period of the agreement between the University and a unit member, a group of unit members, or the Association with respect to the interpretation or the application of a specific term of the Agreement. In a preliminary statement to the grievance procedure, both parties acknowledge their intention to use their best efforts to encourage the informal and prompt settlement of any complaint respecting the interpretation or application of the Agreement. The grievance procedure commences with informal presentation of the complaint to the administrator whose decision or action is being contested. In the event that there is not satisfactory resolution through this informal process, a five step written grievance procedure is available. The first three steps involve presentation of the grievance to campus administrators by the grievant, step 3 in each case providing for presentation of the grievance to the campus president's designee. If satisfactory resolution has not been achieved through these campus processes, then AFUM, and only AFUM, may determine to carry the grievance forward to step 4 to the Chancellor's designee, the Associate Vice Chancellor for Employee Relations, for presentation to that person. The final step in the grievance procedure, again available only to the Association, is binding arbitration by an arbitrator competent in matters concerning institutions of higher education who is selected either by joint agreement of the parties or through the auspices of the American Arbitration Association. Arbitrators have no authority to substitute their judgment for the academic judgment exercised by University administrators, cannot award tenure as a remedy and are required to refrain from issuing statements of opinion or conclusions not essential to the determination of the issues submitted to them.

Time limits regarding the processing of grievances at each step are specified in the Agreement, as is a frequently utilized mechanism for extension of those time limits. Other salient features of the grievance procedure designed to assist in informal resolution include a requirement to conduct grievance procedures in private and a guarantee that no complaint informally resolved or grievance resolved at steps 1, 2, 3 or 4 shall constitute a precedent for any purpose unless agreed to in writing by the Chancellor or his designee and the Association. Furthermore, all documents, communications and records dealing with the processing of a grievance are to be filed separately from the personnel file of unit members excepting the decision resulting from arbitration or settlement.

Authority regarding arbitration is centrally located in both organizations, resting with the Associate Vice Chancellor for Employee Relations acting as the designee of the Chancellor in the case of the University, and with the Association acting through a single association-wide grievance committee.

The joint commitment to peaceful and informal settlement is underscored by the inclusion of a no-strike or lock-out clause in the collective bargaining agreement, a prohibition also imposed by state statute.

As of late April, 1980, no grievance had yet been arbitrated by the parties, although the grievance procedure in the collective bargaining agreement has been regularly and extensively used. In the first fifteen and a half months under the collective bargaining agreement, fifty-two (52) grievances were filed by unit members or the Association at step 1 of the grievance procedure (Appendix A).

The most common categories of issues which have been brought to the grievance procedure involve workload determinations and personnel actions. Sixteen (16) of the fifty-two (52) grievances have principally involved workload disputes. Eighteen (18) have involved personnel decisions negative to unit members, nine (9) of those being non-reappointment decisions and nine (9) denials of promotion.

There are a variety of causes for the development of disputes with respect to the various terms of the collective bargaining agreement. The most prominent and frequent in the University's experience has been the misperception, misinterpretation or creative interpretation of a term of the collective bargaining agreement by either the University administration, AFUM or a unit member.

The opportunity for such disagreements about the parties intent in negotiating the collective bargaining agreement is greatest with respect to the article in the agreement regulating workload determinations. No standard teaching workload is specified in the collective bargaining agreement. On the contrary, the article is composed in the main by a series of statements which support the need for variation and flexibility in the assignment of workload. One provision of the Article recognizes that the mix of teaching, research and University and public service responsibilities varies among campuses, colleges, divisions, departments and unit members. Another establishes six (6) broad criteria as the major but not exclusive bases for determining the composition of a unit members workload. Those factors include department responsibilities and needs, college needs, individual competencies, past workload, the relationship of past workload of the unit member to other unit members in the department, and the relationship of that workload toward meeting the responsibilities of the department. Change in workload or practices relating to the scheduling of class times is not prohibited and is subject to a standard of reasonableness. While such flexibility is critical to the effective achievement of an ability to respond to changing student enrollment profiles and needs, the Article has been demonstrated in its application to be susceptible to uncommon and diverse understandings as to its meaning.

Several techniques have been developed by the University in an effort to achieve a reasonably uniform application of the agreement from department to department and campus to campus. The first of those attempted under the collective bargaining agreement was a series of briefing sessions for campus administrators conducted by the University's chief negotiator in the early days after execution of the agreement. Such briefing sessions, however, can constitute only an initial perfunctory introduction to the specific detail of the nearly fifty (50) page collective bargaining agreement. Accordingly, further efforts to dissect, interpret and apply to real life situations the more novel, complicated or critical terms of the collective bargaining agreement were undertaken by committees of administrators. Most notably, a committee consisting of chairpersons excluded from the collective bargaining unit, Deans, a Vice President and employee relations staff worked diligently at the largest campus in the system to produce sets of administrative guidelines for the implementation of certain provisions of the agreement, which were shared, where applicable, with other campuses throughout the system.

As grievances occurred and were processed to step 4 of the grievance procedure, the University establisned a mailing list of administrators to receive all step 4 grievance answers issued by the Chancellor's designee. Answers were drafted or modified so as to protect the anonymity and privacy of the grievant involved. The general circulation of grievance answers issued at step 4 to administrators responsible for contract implementation was seen as another tool enhancing uniform application of terms of the collective bargaining agreement, especially those terms which had led to some disagreement about their meaning between AFUM and the University.

The basic mechanism for reducing misinterpretation of the collective bargaining agreement by administrators was the maintenance of an open and widely utilized

consultative network both at the campuses and the system Office of Employee Relations. Where chairpersons, Deans, Vice Presidents or Presidents had any questions, concerns, doubts or anxieties about the application of any terms of the collective bargaining agreement, they were encouraged to contact a designee for contract interpretation at each campus. They were especially encouraged to do so when a complaint had escalated to the filing of a written grievance. The employee relations designees at each campus were similarly encouraged to discuss any campus contract interpretation problems about which they were uncertain or uncomfortable with the system-wide Office of Employee Relations.

Inherent in the encouragement of such a dialogue is a danger that the efforts to obtain uniform application of the agreement are misunderstood as an infringment on the ability to manage one's administrative jurisdiction. It is apparent that the process of collective bargaining agreement implementation over the last year and a half since the execution of the agreement in September, 1979 has contributed, at least in some small way, to an increasing centralization at the University of Maine. But this degree of centralization was not only the inevitable result but the specific legislative design of several earlier acts, including the merger of public higher education institutions in Maine in the late sixties, and the enactment of the University of Maine Labor Relations Act with its particular provisions supporting the concept of system-wide bargaining in 1975. Nonetheless, there has been a deliberate effort on the part of University negotiators to vest authority for various collective bargaining functions at the lowest administrative level where it can be successfully executed, and to protect that authority from compromise under the collective bargaining agreement.

For example, workload assignments are the province of the department chairperson, in consultation with the affected faculty member and other interested faculty in the department, subject to the approval of whatever other campus administrator the President may designate. Except for tenure decisions which the Board of Trustees has retained, personnel decisions regarding appointment, reappointment and non-reappointment, promotion, or continuing contract for those faculty members not eligible for tenure, are generally within the responsibilities of the campus chief administrative officer (President) and his or her designee. Criteria to be utilized in evaluation and personnel actions are not specified within the collective bargaining agreement but are left to development by faculties and administrators through contractual or administrative procedures at the campus levels.

Several other factors have caused problems in the administration of the collective bargaining agreement. The most serious of these is some undertaking on the part of grievants and/or AFUM to dilute or expand the bargained language appearing in the collective bargaining agreement, especially as it concerns decisions in individual personnel actions. The collective bargaining agreement does not establish criteria for the making of such decisions by campus administrators. In the case of promotional decisions, no reasons are required to be formally given where a unit member unsuccessfully seeks promotion. Decisions as to whether faculty members shall be reappointed or promoted rest with the campus chief administrative officer, and as to whether or not faculty members shall be granted tenure, with the Board of Trustees. The collective bargaining agreement does not establish any standard of review or weight to be granted by the campus chief administrative officer (President) or Board of Trustees to faculty and lower administrative recommendations with respect to tenure, promotion or reappointment decisions. The collective bargaining agreement, in the grievance procedure, specifically prohibits an arbitrator from substituting his or her judgment for the academic judgment exercised by the chief administrative officer (President) or designee or the Board of Trustees or their designee. Nonetheless, several grievances have been filed and are pending at arbitration where the grievant has challenged not only the procedure employed by the University in reaching its negative decision but the substance of that decision and its validity as well.

In some instances, a problem associated with contract administration has been an antagonism towards or lack of recognition of the Union and its role as the sole and exclusive bargaining agent for the University of Maine faculty unit, or some individual antagonism by faculty unit members regarding certain administrators to whom they are responsible. One issue that has caused difficulty on more than one occasion in this respect involves individual salary increases. Administrators have recognized particular needs to provide unique salary increases to certain faculty members in order to retain qualified faculty and to assure the survival of important academic programs. While these are legitimate concerns, in at least one instance the Union's right to participate as the bargaining agent in salary determinations beyond those required by the collective bargaining agreement was questioned or ignored. The effect was predictably unhealthy--disgruntlement by the individual, misplaced blame on the union, misunderstanding by certain administrators and finally a resolution providing a salary increase too late to be effective. While such individual incidents consume an inordinate amount of the parties' time and attention, they are mercifully limited in their occurrence.

Numerous administrators are responsible for the supervision of employees in more than one collective bargaining unit or the management of segments of the University's operations which require knowledge of as many as six different sets of personnel policies or collective bargaining terms. In some respects, the terms of these policies show greater variation from unit to unit than in the period prior to collective bargaining. This is an inevitable result of separate representation in units where the interests of unit members differ. Nonetheless, contract administration becomes a more difficult task for those adminstrators who have four collective bargaining agreements and two sets of personnel policies to administer and wonder sometimes how to keep "all of the balls in the air."

Finally, some fear of decision making in a collective bargaining environment has been exhibited by some administrators due to the real or imagined consequences of making decisions. While this phenomenon was more prevalent in the initial periods of application of the collective bargaining agreements to situations encountered soon after their execution, it is dissipating due to an increased familiarity with the collective bargaining and grievance process and the recognition that substantial managerial freedom still exists.

The collective bargaining relationship has also brought with it an entirely new set of potential conflicts, those arising out of issues of Union concern as well as those of individual faculty concerns. Numerous articles in the collective bargaining agreement relate not to individual faculty rights and responsibilities but to the relationship between the University of Maine and AFUM. Because of the existence of a bargaining representative and contract terms regulating the relationship with this bargaining representative, potential for conflict is created about such issues as Union recognition, the obligation to inform the bargaining agent about acts taken by the institution, or the need to consult with or bargain with the representative about certain matters. These issues are exacerbated by the statutory division of University employees into six separately identifiable bargaining units, a division which was not as clearly recognized or significant to any organization prior to the onset of collective bargaining. This division contributes to Union concern about issues of such matters as bargaining unit work and the erosion of bargaining unit numbers and strength which generate conflict not only with the institution but with other units and their representatives as well. Related to this particular issue of union concern is AFUM's need to be visible to its constituency and to possess or exercise "clout," a word sometimes uttered by AFUM representatives in connection with discussion of disagreements over bargaining unit work.

Other faculty reactions which have contributed to conflict generation include the failure of some faculty to recognize the demise or reduction of authority of certain governance bodies, at least insofar as they were previously concerned with "wages, hours, working conditions and contract grievance arbitration," the matters which are mandatory subjects of bargaining with the bargaining agent under the University of Maine Labor Relations Act. Thus, conflict is increased not only with faculty acting through their representative but with faculty acting through bodies and committees whose prior functions now cannot exist harmoniously in a collective bargaining setting with the collective bargaining agent.

There is a parallel source of friction generated by some administrators in this particular area. That is, some administrators fail to recognize that there has been a shift in authority in some matters from a system of unilateral or collegial decision making to the bargaining table. Such failure of recognition by administrators can and has generated conflict by causing issues of union concern regarding recognition and obligations to inform or bargain to rise to the surface.

Not all of the additional conflict experienced through collective bargaining should be characterized as unhealthy. One factor leading to additional faculty complaints is that the collective bargaining process has resulted in a written collective bargaining agreement widely distributed and known to faculty members, providing written policies establishing faculty rights and responsibilities where such written policies did not in all cases exist at some campuses.

Alternatives and Prospects for the Future

Aside from the grievance procedure, one additional provision of the collective bargaining agreement between the University of Maine and AFUM was designed to provide a forum for discussion of contract implementation issues. That article, entitled "Meet and Discuss" grants to AFUM an opportunity to meet periodically with the Chancellor or campus chief administrative officers (Presidents) and their designees for the purpose of discussing matters necessary to the implementation of the agreement. The agreement specifically excludes from such meetings a discussion of specific grievances, the conduct of collective bargaining negotiations on any subject, or the modification,

addition to or deletion from any provision of the agreement. The provisions of the Meet and Discuss article are available at the request of either party but on no occasion has the University initiated a request for such a meeting. AFUM has done so with respect to only four of the seven campuses and despite the opportunity for more frequent meetings, has met on only one occasion at three of these four campuses. Committee size which is permitted under the provision tends to be large and the meetings formal and thus not as conducive to the resolution of issues as more individual and informal discussion through the first and informal stage of the grievance procedure can permit. In some cases, the sessions have been adjourned while the parties' representatives involved in the campus level meetings have rushed for the telephone to confer with the negotiating representatives from their respective parties in an effort to determine what the "record" of negotiations indicated with respect to a particular subject. At one campus, minutes of these Meet and Discuss sessions are maintained and distributed to all participants. AFUM requests for meetings tend to be made in reaction to administrative decisions and represent an "end run" on the grievance procedure in situations where a grievance could have been filed. It would appear that while the more structured and formalized Meet and Discuss opportunities provided by the contract may have some limited future appeal and utility, the principle road to successful and harmonious coexistence between the University and AFUM lies elsewhere.

Necessary to the maintenance of such a relationship in the future would appear to be several important elements. First, a mutual respect for the integrity of the provisions of the collective bargaining agreement. Second, continuous education of administrators, faculty and union representatives regarding the meaning and purpose of the various sections of the agreement. Third, where disputes do arise, prompt, vigorous efforts to resolve differences informally through the complaint procedure, and if necessary the more formal grievance procedure. This element, to achieve harmony, requires a devotion of enormous amounts of time to the gathering of facts and the discussion of implications of grievances. The time of academic administrators is occupied by the execution of other important functions in addition to this new task. For that reason, it is important that at some levels of the grievance procedure, persons for whom complaint and grievance handling is a major responsibility be designated to act on behalf of the University. Where grievance handling is a principal function of an administrator, the devotion of extensive amounts of time to the consideration of grievances and discussion of them with grievants and the Association can occur. Furthermore, while the representatives of the parties remain advocates, grievances have been solved most effectively in those situations where the representatives nonetheless come with a desire to work cooperatively to explain and solve the underlying problem rather than merely to sustain the party's position. Thus, while the grievance representatives are expected to protect the technical arguments and defenses for later presentation, such as at arbitration, primary attention has been devoted to a search for resolution of the underlying complaint where grievance procedures have served the parties best.

Conflict within the University of Maine will not likely diminish as collective bargaining supplants other traditional governance mechanisms as the process for faculty involvement in decisions regarding their employment; but through open communication and constant attention to problem-solving through a smoothly functioning grievance procedure, especially at its first informal level, that conflict may be effectively managed.

APPENDIX A
UNIVERSITY OF MAINE
GRIEVANCE SUMMARY AS OF 4/15/81
September 15, 1979 - December 31, 1980

Total Grievances Filed	52
STATUS	
Withdrawn/Settled	20
Pending (Step 4)	5
Pending (Steps 1-3)	14
Arbitration Requested	13

TYPE	
Work Load	16
Tenure Denial/Non-Reappointment	9
Promotion Denial	9
Other	18
Reprimand	
Personnel File	
Union Security	
Leaves/Benefits	

Total Arbitrations Requested	13
STATUS	
Withdrawn/Settled	4
In Process	9

TYPE	In Process	WD/Settled
Work Load	4	1
Tenure Denial	1	1
Promotion Denial	3	1
Leave/Benefits	1	-
Union Security	-	1
	9	4

9. CONTRACTUALLY PROTECTED SENATES AT FOUR-YEAR COLLEGES

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The advent of faculty bargaining in the early 1970's spurred much speculation about how academic governance in general, and faculty senates in particular, would fare on unionized campuses. Critics of bargaining worried that unions would abolish senates as "company unions," or that the unions would infiltrate faculty senates to the extent that the senates became mere tools of the union.

Such dire predictions were not borne out at most unionized campuses. Kemerer and Baldridge (1975) and Begin (1974) have reported that academic senates appeared relatively unscathed at most unionized campuses where senates existed prior to the election of a bargaining agent. Many unions have pacified faculty who fear that collective bargaining will destroy collegiality by permitting existing governing structures to continue without formal union participation or "interference." Such a system where a nonunion governance system operates alongside a faculty union is called "dual track goverance."

Although patterns of dual track governance differ, the prevalent model divides policymaking into academic matters, which the senate[1] controls on behalf of the faculty, and economic issues, which the union handles. In effect, the senate "bargains" continuously with the administration over curriculum, academic standards, and other academic policy matters, while the union bargains over salaries and fringe benefits and processes faculty grievances. The model suggests parallel, and separate, governance systems.

Whether or not dual track governance operates to separate employee welfare issues from those of academic policy is not a trivial issue. The recent Yeshiva[2] case denied faculty the right to bargain because the court believed that the faculty was "managing" the institution in all areas, including those related to faculty welfare issues. The Court could not separate the interests of faculty as employees from their professional interests in academic policymaking, an interest which the court labeled "managerial". Therefore, ascertaining the success of dual track governance is important for two reasons. First, if unions can permit faculty senates to operate independently, unions will earn the trust and respect of the faculty. Secondly, if it can be shown that through dual track governance, faculty employee interests are pursued separately from their professional interests in academic governance, then perhaps the Yeshiva precedent can be avoided or modified in subsequent litigation.

Contract Analysis

One of the strongest devices for preserving the existence of the faculty senate is explicitly to include the senate or other nonunion governance system in the contract. Inclusion guarantees that neither party can modify the governance system without the other's consent during the life of the contract. The results of a search of the collective bargaining agreements of four-year colleges and universities[3] revealed that fifty-eight contracts contained some form of explicit protection for a faculty senate or other nonunion governance system. Twenty-five of the institutions were public, while thirty-three were private. The AAUP was the bargaining agent for twenty-five of the colleges, the AFT represented fifteen, the NEA represented thirteen, and independent agents or coalitions represented the remaining five colleges.

Table 1.

Control and National Union Affiliations
of Four-Year Colleges Whose Collective
Bargaining Agreements Contain Protection
for Faculty Governance Groups
November, 1980

	Public	Private	Total
AAUP	11	14	25
NEA	7	6	13
AFT	4	11	15
Independent	2	2	4
AAUP/NEA	1	0	1
TOTAL	25	33	58

Source: NCSCBHEP Contract Library

Somewhat surprisingly, senates were included in only twenty of the fifty-eight contracts--approximately one-third. The AAUP tended to include the senate much more often than did the NEA or the AFT. However, inclusion of the senate ranged from simply mentioning its existence to incorporation of a senate charter and bylaws into the contract. Some contracts forbid the senate to involve itself in matters specifically reserved to the union (usually salaries, fringe benefits, and other economic matters).

Upon reflection, the low incidence of contractual protection for the senate is not as surprising as it might at first appear. Many "faculty" senates are not limited to faculty, but include administrators, students, nonteaching staff, alumni, or other groups. Sometimes faculty do not even make up a majority of the senate members. In such cases, faculty may not regard the senate as their representative, nor consider it worth protecting contractually. There are other committees, however, that faculty did appear to value and to want to protect.

Well over two-thirds (38) of the contracts included some form of faculty promotion and tenure committee. Such committees were by far the most carefully protected. Committee responsibilities, method of selecting committee members, and decisionmaking

procedures were explicit. Contracts for private colleges tended to include longer procedural sections, perhaps because they lack the due process protection available to faculty at public institutions.

Curriculum committees also were included in just over one-quarter of the contracts. Often, the curriculum committee reported to the faculty senate or other institution-wide governance committee, while the promotion and tenure committees with contractual protection generally reported to the president or academic vice-president.

Many of the contracts specified how--and whether--new committees were to be created. In most instances, the contract permitted the faculty, but not the administration, to constitute new faculty committees unilaterally. Other procedural protections included the running and certification of elections for membership on faculty committees and the selection of members of search committees for administrative vacancies.

While the contract analysis was a useful indicator of the kinds of protection afforded nonunion faculty governance, it gave no indication of how dual track governance actually operated on campus. The formal contract structures appeared to be separate, both organizationally and operationally. But only by analyzing the operation of dual track governance on college campuses could it be determined whether the structure created by the contract had been adhered to in practice.

Dual Track Governance in Practice

Although contracts for only fifty-eight of the over two hundred and fifty unionized four-year colleges explicitly protected a faculty governance system, these fifty-eight colleges represented every type of institution from large research universities to small liberal arts colleges. The eight colleges where dual track governance was studied more closely were selected to represent that diversity.[4] Four large universities were selected, three of which were public and one of which was private. A public state college and three private liberal arts colleges completed the sample.

The president of the union and the chairperson of the senate or other faculty governance group at each of the eight colleges agreed to be interviewed for this research. Each was asked about the structure of the nonunion governance system, the areas of policymaking for which the senate and the union were responsible, and whether either body had attempted to encroach upon the other's areas of responsibility. Senate and union presidents were also asked about the informal relationships between union and senate leaders, and with the administration. Additionally, the respondents were asked how much influence the union had over the selection of faculty to serve on nonunion governance committees.

Despite the diversity of the colleges and their unique bargaining and governance histories, the respondents from all eight institutions agreed that the senate and the union were careful to stay out of each other's territory. Union's generally concentrated upon salary and fringe benefit negotiations, and pursued grievances on behalf of the faculty. On no campus did the union become involved as a union in matters being deliberated by the senate. Although the union did become involved in senate matters in subtle, informal ways, no union officer served on a nonunion governance committee by virtue of his or her union office.

Unions as Preservers of Collegiality

The senate and union leaders did believe, however, that the presence of the union provided important protection for the senate. Unionization occurred at all eight of the colleges partly because the faculty were dissatisfied with their limited role in governance. At each of these colleges, the governance system had been incorporated into the contract because the faculty wanted their governance system to have legal protection rather than to exist at the pleasure of the administration or trustees. Campus respondents believed that, although the union did not participate formally in senate activities, the union's presence protected the senate and tacitly enforced the procedural integrity of the nonunion faculty governance system. They felt so strongly that this protection was necessary that the faculty were willing to submit their governance system to bilateral negotiations over which most faculty had very limited control in order to give that system legal status.

On one campus the administration was attempting to use the senate as a bargaining chip in order to discredit the union. The administration was attempting to persuade the union to abolish the senate in return for concessions which the union wanted. The union, however, would have no part of the administration's scheme, and refused to sacrifice the senate in order to gain other benefits. It was clear at that institution that the union's continued existence depended upon its ability to preserve the faculty senate.

Union Influence Upon Senate Committee Membership

Even though the union and senate governance tracks were formally separate, if the union could select senate members, or influence their selection, the senate could not fairly be held to be independent of the union. Each senate and union leader was asked how committee members were selected, and which role the union played in their selection.

At six of the colleges, selection of governance committee members was completely independent of the union. Committee members were elected by their departments or schools to represent their academic units. For those few committees where members were appointed by a senate executive committee or other faculty group, the union was not involved in the selection process.

However, at two of the colleges, the union did influence the selection of committee members. At one institution, the union nominated all candidates for governance committees, who were then voted upon by the union membership. Only union members could vote, although nominees for committee membership did not have to belong to the union, and often did not. This situation was the most extreme example of union influence over the membership of nonunion committees.

At the second college, the union appointed one-third of the members of each governance committee. The faculty elected one-third of the committee members at large and the administration appointed the remaining members. Thus, the members selected by faculty could control the committees should the need arise, although the union could not control a committee majority without the members elected by the faculty.

Overlapping Leadership

Although there appeared to be little formal overlap between the activities of the union and those of the senate, there was extensive overlap in the leadership of the two organizations. At five of the eight colleges, the senate chairperson interviewed for this study had recently held an office in the union, either as president, negotiator, or committee chair. All but one of the eight union presidents interviewed were concurrently serving on nonunion governance committees.

When questioned about these overlapping responsibilities, the respondents did not find their dual roles unusual or difficult. Union leaders maintained that their union position had no relationship to their election by their department colleagues to serve on governance committees. Their attitude was that faculty will elect people who are willing to serve and whose judgment they trust, regardless of any coincidental union leadership position that the individual may hold. Those union leaders who served on senate committees did not believe that their union position created a conflict of interest, for they asserted that they acted "like faculty, not like a union leader," while deliberating on matters of academic policy. These union leaders believed that they could, and did, separate their concerns related to the union from their professional concerns as members of policymaking groups. Collegial values appeared to be strong among these union leaders.

It may be this very overlap of union and senate leadership that permits unions and senates to be nominally independent of each other. A union president does not need to intervene in senate matters if he or she is also a member of the very senate committee that determines such matters. Similarly, a senate committee need not take upon itself the determination of some matter related to salary or fringe benefits if many of the senate committee members also are influential within the union hierarchy. Members of both governance tracks are well informed about what is going on and the nature of the respective union and senate concerns. Rather than being coopted by the union, the senate cooperates with the union by honoring the formal boundaries between the areas of responsibility assigned to each.

There was no indication that this widespread overlap in senate and union leadership was an attempt by the union to "infiltrate" the senate. Union leaders who served on senate committees had been active in governance for years; many had served on senate committees long before the college was unionized. Overlapping senate and union activities really represented the inability of the union leaders to disassociate themselves from the nonunion governance structure because of their desire as individuals to be involved in academic policymaking.

Advantages of Contract Protection for the Senate

It is not at all clear that dual track governance succeeded at these eight institutions simply because the nonunion governance structure was protected by the contract. Other factors, such as the attitudes of the administration toward the union, and the willingness of all three parts of the governance system--union, senate, and

administration--to make the system work were critical. However, several factors found at these campuses may have contributed to the success of dual track governance.

At most of the eight institutions, pre-unionization relationships between faculty and administration had been poor, and the campaign to organize the faculty was generally resisted by the administration. The faculty's distrust of the administration was a primary reason for the union's decision to include the governance system in the contract. Giving the faculty governance system legal status clarified much of the ambiguity about how governance would operate after unionization. Each part of the tripartite governance structure operated in a defined area of policymaking and, slowly, trust and respect began to develop.

Although the level of trust varied according to the institution's unique circumstances and history, some degree of trust existed at each of the eight colleges. At several of the institutions, for example, relationships between the administration and the union leaders were so positive that they resolved grievances or other problems informally, without using the formal grievance resolution structure. A senate leader on one campus asserted that "the relationship between the union and the administration determines whether governance works well." This high level of trust extended to the senate as well. Because their contractual status protected senates against modification or abolition by administrative (or union) fiat, the senate leaders had the security of equal partnership with the union and the administration.

The second factor prevalent at campuses with contractually-protected senates was restraint. All three parties to the governance triumverate reserved some of their power or authority. For example, the administration agreed to meet with the union whenever necessary, rather than limiting meetings to those "meet and discuss" sessions required by the collective bargaining agreement. Similarly, the union did not assert its legal status as the sole representative of the faculty, but allowed the senate to speak for the faculty on all noneconomic matters (even if they were related--as most were--to "terms and conditions of employment"). And the senate left the negotiating of all contract matters, even those touching upon academic policy, to the union.[5]

Probably the most important impact of contractual protection for the senate was the responsibility it created for the union as the senate's protector. Such a role enhanced the union's image with the faculty by making the union appear to be the preserver of collegiality. It also appeared to foster trust and mutual respect between the senate and the union, which permitted both organizations to respect the formal boundaries between them. The overlapping senate and union leadership reinforced that formal separation of functions, but resulted in an actual blurring of the responsibilities of individuals who participated in both systems.

Because of the overlapping roles of senate and union leaders, it is difficult to demonstrate that dual track governance can separate successfully faculty employee interests from faculty concerns as professionals. Even though the two systems are formally independent, their functional interdependence frustrates an attempt to prove that unions and senates are separate organizations with separate concerns. It is not surprising that the Court in Yeshiva could not understand, much less endorse, the dichotomy of faculty-as-employer and faculty-as-professional, for faculty themselves cannot always realistically separate their employee and professional concerns. Nevertheless, the decision to include the senate in the contract appears to benefit governance relationships on unionized campuses. Legal status for the senate reduces ambiguity, increases trust, and permits the union, often feared as a destroyer of traditional governance, to emerge as the guardian of collegiality.

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[1]The term "senate" will be used generically to describe any nonunion committee or system of committees that provides faculty with a meaningful opportunity to participate in institutional policymaking.

[2]NLRB v. Yeshiva University, 444 U.S. 672 (1980).

[3]This contract search was performed by the National Center for the Study of Collective Bargaining in Higher Education and the Professions.

[4]Because case studies were conducted at only eight colleges, the findings concerning governance at these institutions must not be considered to be representative of all unionized colleges, or even of all colleges with contractually-protected senates.

[5]Birnbaum has suggested that self-limitation, especially by the union, is an effective mechanism for changing destructive bargaining relationships into positive ones (1980, pp. 227-230).

10. ARBITRATION IN HIGHER EDUCATION: IS ACADEMIC ARBITRATION SUI GENERIS?

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Introduction

Arbitration is a powerful, efficient and fairly speedy method of resolving disputes about the application and interpretation of collective bargaining contracts. The arbitrator is a quasi-judicial hearing officer whose final and binding awards are almost always enforced by courts, when such is necessary, and whose judements are seldom questioned by the courts. Since arbitration is a dispute resolution mechanism in most academic contracts, the sources of the arbitrator's authority and the limits on it should be understood by those who are subject to that authority. Whence does the power arise? How is it exercised? In what way, if at all, are academic labor arbitrations different from arbitrations in other employment sectors? Why has it been declared the national labor policy to encourage resolution of disputes through grievance and arbitration machinery?

The authority of the arbitrator arises from the words of the collective bargaining agreement and has been enforced by law (i.e. the CPLR in New York, or Section 301 of the Federal Labor Management Relations Act.) The application of the law arises from interpretations of the courts which have defined the authority bestowed by statute and contract.

In the Steelworker Trilogy of 1960 and in a number of succeeding cases, the Supreme Court of the United States has found that existing labor law puts very broad powers in the hands of arbitrators. The courts may decide whether a contract actually exists, whether (in New York at least) the limits of time have been met, and whether the presented issue colorably arises from the essence of the agreement. In the vast majority of cases, these questions are, or would be, answered in the affirmative.

So long as an issue may possibly be found to arise from the language of the agreement, the arbitrator selected by the parties has jurisdiction over it. He may determine whether the issue is properly before him. The courts have said that the issue of arbitrability under the contract's restrictions is for the abitrator to decide. He has the authority to decide the substantive issue on the merits if the matter is properly before him.

There are exceptions. Where a matter is one alleging both contract violation and violation of the LMRA, the NLRB may defer to the arbitrator's award or overrule it. When the alleged violation is one concerning both a contract violation and violation of equal employment opportunity laws, a losing grievant may begin a suit de novo in the courts. In Alexander v. Gardner-Denver, the Supreme Court has said that the arbitrator's award in equal opportunity cases will be given great weight. But it is not final and binding except against the employer.

In each instance, the arbitrator's authority arises from the contract. He does not apply statute law unless the contract tells him to do so. And where there is a conflict between the "four corners" of the contract and the law, most arbitrators will apply the contract. If the contract is contrary to law and public policy, the award will be vacated because the underlying document is ultra vires. (In one important agreement in New York, the arbitrator is directed to apply remedies found in the statutes, if he finds that the contract prohibition against discrimination was violated.)

For what other reasons will a court vacate an award? The reasons are very limited. Please notice that none which I will now list ask whether the arbitrator has made an error of fact or interpretation. The reasons are purely procedural. They include 1) exceeding the question submitted by the parties; 2) exceeding the powers set forth in the contract - for example reinstating a faculty member where the contract requires reference to a faculty committee; 3) fraudulent or grossly biassed behavior by the arbitrator; 4) the writing of an incomplete award or one with mathematical errors; 5) failure to follow specified procedures, i.e. declining to accept colorably relevant evidence; or refusing reasonable requests for adjournments.

Since very, very few awards are vacated, even where the court believes the arbitrator made an error of fact or law, it must follow that professional arbitrators do not exceed the powers they are given.

Few persons in society have so much real authority vested in them. The power of the arbitrator arises from a unique initiating cause. Before any dispute ever arose, the parties to the contract had agreed in writing that any controversy concerning the application or interpretation of the contract would be submitted to final and binding arbitration. The arbitrator was to be chosen mutually by the parties. Any restrictions on his powers were written into the agreement. This voluntary decision to submit together with the mutual choice of the arbitrator is the reason why national labor policy encourages the use of the process. It is a volitional choice of the parties.

The arbitrator is bound to decide within the limits set by the parties. Let me stress that he has no right or power to impose his personal biases upon the parties. His job is to apply the contract whether he agrees with it or not. As Mr. Justice Douglas wrote in Enterprise Wheel and Car Corp., (one of the Steelworker Trilogy cases):

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice...his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

"The College Model"

Every point I have made above is applicable to college arbitrations. Such proceedings are not a different breed of thing - sui generis, not comparable to other

arbitrations. The arbitrator appplies the contract. Where the contract limits him, he does not act. Where the facts set up special situations, he must recognize the differences. But this is true in every contract everywhere. One of the most prevalent protestations the arbitrator hears on first introduction to a relationship is "we are unique." As we are told in Porgy and Bess, "It ain't necessarily so."

What is true about academic contracts is that they restrict what may be reviewed to a greater extent than is true almost everywhere else. How the reviews will occur and under what rules are not different. The arbitrator adapts to the provisions of these contracts just as he adapts in every other relationship.

An unusual feature of academic agreements is that they provide so little protection in the area of substantial personnel actions which would at least be reviewable in many other areas. These actions are appointment, retention, promotion and tenure. As an example of the difference, I recently heard and decided a case in which an employee of the State of New York alleged that the failure to promote him was an arbitrary act violative of the agreement. Such a case would not reach an arbitrator in academic cases, except on a plea of procedural defect.

Curiously, the most serious of all personnel actions, dismissal of a tenured teacher, is usually arbitrable. This is true whether the dismissal is a termination during reduction in force or a discharge for cause.

Reductions in force ordinarily trigger contractual procedures dealing with such events. Procedures, as I shall show below, are eligible for review. There is no academic contract I have seen which denies the union the right to contend that the various steps which the parties have agreed upon in order to effectuate an action were not followed.

Most contracts also provide that discipline for cause - disciplinary termination or suspension or demotion - of a tenured academic employee shall be reviewable for "just cause." This concept is a term of art whose meaning has been developed in literally thousands of awards. Arbitrator Carroll Daugherty set forth a number of criteria for establishing just cause. His discussion in the Enterprise Wire Co. award 46 LA 369, recognizes that not all of the critieria will or need be met at any one time. Room for arbitral judgment remains.

Frequently cited criteria include the following questions. Did the employee have reason to know of the rule he allegedly violated? Is the rule reasonably related to the needs of the employer's enterprise? Did a fair investigation occur? Was the employee given an opportunity to explain before a decision on discipline was reached? Was the discipline reasonably related to the event? Was there disparate treatment?

If discipline might be justified under these rules, an arbitrator will apply the "reasonable man" rule in deciding whether to intervene. The arbitrator will not substitute his judgment for that of the decision maker if a reasonable man in prudent conduct of his business affairs could have come, on the facts and circumstances in dispute, to the decision reached.

Put differently, an arbitrator will not change a judgment unless it is arbitrary, capricious or discriminatory. Arbitrary means: unrelated to the facts by reasonable interpretation. Capricious means: whimsical, changing, unpredictable action. Discriminatory means: Different treatment for persons in like circumstances.

In disciplinary matters including discharges, whatever protections are available to employees elsewhere are available if a just cause article appears in the contract.

When such a provision exists, the president and trustees may have their acts reviewed by an arbitrator even if the employee was disciplined pursuant to AAUP procedures. A disciplinary action was reversed by an arbitrator at LIU in exactly those circumstances.

But the same protections do not exist in ARPT actions. To some degree this is not surprising. Probationary employees have very little protection in the private and governmental sectors. But probation in other sectors is much shorter than the three to seven years common in academic life. The difference is so great that one might think it is more than simply one of degree. If academic probationers ought, by some abstract concept of justice, to have greater protection, the truth is that they do not have it. Nor will the arbitrator provide it. He does not sit to do equity but to apply, fairly, the contract written by the parties. As Mr. Justice Douglas said, the arbitrator does not sit to dispense his own brand of industrial justice (or academic justice).

Review of ARPT and RIF actions is usually limited to a determination of whether errors of procedure occurred. Because the arbitrator is limited, most of the time, to

procedural review, and because the rights of employees in these cases are limited to procedural regularity, the arbitrator will examine closely whether all required procedures were followed. There cannot be substantive due process if the employee was denied procedural due process.

In RIF cases the following procedural questions arise. Was seniority followed when required? If the contract allows exceptions, were the exceptions which occurred strictly within the contractual rules? Were letters sent on time? If the contract requires efforts to find other places for the employee, were these efforts made?

In ARPT cases, the following questions often arise: Were all time limits met (This includes time for appealing an adverse action by the employee or union)? Were the specified committee procedures followed? Often the rules about requires procedure are in school and department by-laws which are incorporated by reference into the agreement (The president is responsible, unless the contract specifically speaks to the contrary, for failures of procedure not only in his own office but also in the offices of lower-level administrators; and even for failure of faculty committees which are part of the personnel process). Were all letters sent, all required administrative reviews completed, all specified memoranda written?

Even if the arbitrator finds a violation, he is seldom empowered, as he would be in the industrial sector, to reinstate or promote an employee or to grant him tenure. Contracts usually specify that the arbitrator shall return the matter for reconsideration by the committees which originally handled the matter or by others set up for the purpose. One distinguished arbitrator had an award vacated by the Court of Appeals of the State of New York, a most unusual act, because he reinstated an employee, thus conferring tenure upon her. Tenure could not arise from a contractual violation, even if present, the court ruled.

Due Process Issues

What sorts of procedural rulings have arbitrators made? In the City University of New York, presidents must give reasons for personnel actions under certain specified circumstances. A number of arbitrators have ruled that those reasons must be specific and precisely related to the action taken concerning the individual who requested the reasons. Even if the substance of the reasons cannot be reviewed, they must have specificity and substance rather than be vague and general. A good guideline is that proper reasons would be replicated by another decision maker faced with the same facts and circumstances.

A different case involved a number of promotions for non-teaching professionals made on several campuses of a multi-center university. The promotions violated a "rank ceiling" policy set by the administration. The affected employees were given higher ranks than the policy allowed for their jobs. The university ordered recission and the campus presidents complied. I was the arbitrator, and I faced a contract which said that each campus president had the final authority to make promotions even if he overruled the unanimous recommendations of the committees below. Two of the letters of promotion were conditioned upon approval by the central administration. I found that these were not effected promotions since the approval was not provided. The other four letters were unqualified. I found that the university was bound by these letters which were in the nature of contracts. They could not be rescinded except for disciplinary cause or possibly a RIF.

Notice that this award did not deal with validity of the policy or the reasons of merit as to why the grievants should or should not have been promoted. The only question was whether the recision did or did not violate a contractual procedure.

While arbitrators may and do examine procedures in academic personnel actions, they are usually forbidden to inquire into the substance. Such questions as quality of teaching or research, need for particular specializations, and the like, are beyond arbitral review. (Of course, if a reason was given that the institution was not going to appoint or retain any art historian who was not tenured, and if the college then hired a new art historian, a question would arise whether an honest, as opposed to a substantive, reason was given. In such case, the arbitrator might dig deeper. I will discuss this in a moment). An arbitrator who obeys academic contracts may not ask whether a person who was found to be deficient in a procedure where all required actions occurred, was truly deficient.

The inability to ask that question does differentiate the academic from the industrial sector. In industrial disputes, arbitrators are often asked to answer judgmental questions such as "Was the promoted junior employees really 'heads and shoulders' more qualified than the senior employee?"

The arbitrator is able to answer such a question outside of the academic sector because all or most of the facts and circumstances are disclosed to him. Very often the parties undertake what amounts to a pre-trial discovery process in which the relevant facts which both will rely on are revealed. And there are seldom, if ever, privileged committees whose proceedings may not be examined. The facts do come before the arbitrator in such proceedings. Every person in this room is aware that similar discovery procedures and presentations to the arbitrator are often impossible in academic cases because certain committee proceedings are privileged.

This gives rise to a conflict which is perhaps peculiar to academic arbitration. The arbitrator is estopped from receiving materials. [How different this situation is may be illustrated by an anecdote. Some years ago, I heard a case arising between a major state and one of its unions. A contract principle of some importance was at stake. Throughout the hearings, to the despair of the state's advocate, documents from private files of high state officials were introduced by the union. There was no question of the authenticity or relevance of these writings, and they were admitted. The difference from academia may be as follows. In a university, the best way to spread information unofficially is to tell it to a privileged committee (but you can't get the information before an arbitration). In at least one state, there was no privileged committees de facto, whatever the situation was de jure. Union members worked everywhere, and the union had its own sunshine law.] In academia, the contract estops the arbitrator and hence, he will not take that which is forbidden.

But the arbitrator is also charged with reversing arbitrary, capricious or discriminatory acts, including personnel acts. If the contract does not require at least that much, it provides little or no protection to unit employees.

This second power of the arbitrator means that even acts of substance which have no relationship to the legitimate needs of the institution are not protected from the review of an arbitrator. The non-reappointment of the art historian, if evidence of a discriminatory act could be developed, would be an example of such a reviewable incident. So would the denial of tenure because a person holds a legal, but unpopular, religious or political view, if this reason could be proved.

How can or should the arbitrator deal with conflicting requirements of an agreement? To the degree he can do so, he must reconcile the contract's provisions. One possible way is to rule that he will hear or read, in camera, accounts of what occurred in the closed meetings. If the information shows some evidence of arbitrary, capricious or discriminatory behavior, then it may be released to the union.

There is a danger in this method, however. The arbitrator has no right to enter upon "fishing expeditions." Mere suspicion of contract violation is not sufficient reason to overturn contract prohibitions against examination of privileged actions. So drastic a move should only occur when there is significant and weighty evidence on the hearing record which indicates that examination of the committee actions would show an arbitrary, capricious or discriminatory misuse of power. Only if there is almost a prima facie showing of contract violation should the privileged committee status be breached. It is true that the necessary determination requires a judgment, a balancing of rights. But arbitrators are retained to use judgment. And the institution, as well as the union, had an equal say in deciding who the arbitrator would be.

What if the arbitrator directs production of privileged information and the institution refuses to provide it? If the arbitrator made the demand without an adequate record showing that the direction was reasonable, a court might well vacate an award based upon adverse inferences draw from refusal to produce. But if the award clearly sets forth the evidence on which the arbitrator based his action, and if the evidence was colorably relevant and arguably weighty, a court might refuse to vacate.

The arbitrator has no contempt powers. But he does have the power to decide the dispute. If the privileged information is refused, the arbitrator would have the right to draw an adverse inference, i.e. to find the information is refused because it would damage him who holds the facts.

If the information is provided and it shows that a substantive decision was indeed made, the arbitrator would not interfere, even if he disagreed with the decision. If he took the information in camera and found it substantive, he would not reveal it to the other side.

In other words, where procedure is followed, and where a truly substantive decision is made in good faith, the decision making process will not be breached by any professional arbitrator. This is true because he treats academic disputes like any others on which he sits. The arbitrator answers the question put to him within the restrictions on his powrs negotiated by the parties. He decides disputes which are

properly before him in the way he does because in his professional judgment the essence of the contract requires the answer at which he arrived.

11. PSYCHOLOGY OF NEGOTIATIONS I

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Obviously, the topic assigned to us is a very broad one incapable of being addressed fully in the time alloted. Consequently, I am going to focus on one aspect of the topic--preparing for bargaining--and will speak only to a narrow dimension of it; namely the need for bargainers to develop a method for anticipating bargaining outcomes prior to the actual table bargaining.

But before getting into that topic a few preliminary remarks are necessary.

First, I have no way of assessing the experience of the audience in this room. I assume all have had some experience in bargaining and have tailored my remarks accordingly. I hope the concepts advanced are not so basic as to be worthless. However, I recognize that they are not so arcane and technical that a reflective bargainer could not arrive at similar conclusions without undue effort. My basic hope is that at the very least they will stimulate thinking on the need for, and the mechanics of anticipating bargaining outcomes as an important aspect of bargaining preparation.

Second, I will rely on concepts formulated by Walton and McKersie in A Behavioral Theory of Labor Negotiations (McGraw-Hill, 1965). As a point of reference Walton and McKersie define labor negotiations "as an example of social negotiations, by which...(they) mean the deliberate interaction of two or more complex social units which are attempting to define or redefine the terms of their interdependence." They see bargaining "as...goal directed activity--a set of instrumental acts which can be more or less intelligently conceived and more or less expertly executed." In a moment I will return to a fuller explication of their formulations of the subprocesses involved in the bargaining process.

Third, although I use Walton and McKersie as a reference point, I am not an expert in bargaining theory. I am a practitioner, with a practitioner's pragmatic interest in whatever may be useful in helping me be a successful bargainer. I bargained before I read Walton and McKersie or Schelling, or Peters or Brown and Rubin, or whatever. To me, theory is useful only to the degree I can understand it and apply it to problems I face as a table bargainer.

Bargaining, Subprocesses

Now returning to Walton and McKersie--they see bargaining as a composite of subprocesses. The subprocesses they identify are distributive bargaining, integrative bargaining, attitudinal structuring, and intraorganizational bargaining.

Distributive bargaining involves those activities in bargaining on matters where the parties' preferences conflict. It usually involves the allocation of scarce resources, but can also involve values. It is pure conflict.

Integrative bargaining involves those activities on matters where there is no fundamental conflict over the parties' preferences but rather they seek agreements which benefit both. It is, in a simplistic way, problem solving.

Attitudinal structuring involves those activities where a party is consciously trying to influence the relationship between the parties, particularly the attitudes the opposing party holds towards it.

Intraorganizational bargaining involves those activities where a party is attempting to achieve a consensus within its own constituent group.

All three subprocesses encompass the totality of bargaining activity and in the prebargaining preparation process can serve as useful handles for planning.

With all this as background, we can now turn to the problem of preparing for bargaining, specifically the problem of anticipating bargaining outcomes prior to bargaining.

Bargaining Objectives

Before any bargainer sits down at the bargaining table with the other party, it is imperative that he or she have some understanding of whether or not there is a chance of reaching agreement given his or her own bargaining objectives and the perceived bargaining objectives of the other party. Now this seems a self-evident proposition but the fact is that many bargainers do not carefully analyze the potential bargaining outcomes. Moreover, in most handbooks on bargaining the admonition to prepare for bargaining carefully is rarely accompanied by any advice on the need to anticipate bargaining outcomes under a given set of circumstances, or if there is such advice how it can be accomplished, or how the information gained can be used to shape bargaining strategies.

The simple fact is that if impasse is inherent in the bargaining before the parties sit at the bargaining table (what Walton and McKersie call negative settlement possibilities) that should shape to a large degree the strategies used in the bargaining process, both those used at the bargaining table and those used away from the table. The converse is true if settlement is inherent in the basic bargaining objectives of the parties.

To explore this further, let us look at what Walton and McKersie label the resistance points of bargainers. A resistance point is that point beyond which a bargainer will not go. For example, if the current beginning salary of an instructor is $10,000 and a union bargainer must have a $2,000 increase in that beginning salary, and he or she will not go below $12,000 in bargaining, that figure is that bargainer's resistance point. Parenthetically, Walton and McKersie talk also of a target point, i.e. that point which reflects a bargainer's most optimistic expectations as to bargaining outcome. Careful consideration of a target point is necessary in those situations where positive settlement possibilities exist. In positive settlement possibility situations the task of the bargainer is to maximize the gains possible, i.e. not to reach his or her resistance point before opponent reaches his or her resistance point.

Now, the first task of a table bargainer is to ascertain his or her resistance point on all distributive bargaining issues. The second task is then on each of these issues to divine the likely resistance point of his or her opponent. Obviously, this is easier said than done but a number of factors can be assessed prior to bargaining.

In trying to determine the likely resistance point of an opponent one should look to 1) the past behavior of the opponent--what has been the previous performance of the opponent on this issue?; 2) settlements elsewhere--what is the "going rate" on this issue?; 3) the general economic health of the enterprise; 4) the specific political environment the opponent is operating in--what constituent pressure does he or she have--what kind of control can he or she exert, etc?; and 5) the general political environment--what are ascendant values that will impact upon the bargaining?; and 6) what perceptions does the opponent have about the relative bargaining power of both parties? Remember what you are trying to do in scrutinizing these various factors--you are trying to ascertain the resistance point on a given issue or of your opponent prior to sitting down at the bargaining table.

Bargaining Strategies

Once the resistance points have been determined and it has been established that positive or negative settlement possibilities exist, one can begin reflecting on the strategies to be used in the bargaining. Keep in mind that if negative settlement possibilities exist, in the simplest terms, only three things can happen: You can alter your preferences to remove the disagreement, or you can persuade the other party to alter its preferences, or you both can mutually alter your preferences. A number of factors will dictate the choice. The point I want to emphasize is that just because one perceives that negative settlement possibilities exist prior to bargaining that is no

reason, in and of itself, for one to alter immediately one's preferences. That should be done, if at all, during the bargaining process. In other words, utilize the process to its fullest potential.

Obviously the dimensions of the disagreement will have strategical planning implications. The greater the gap the less likely pure rationality can be used to close it. Moreover, even if the disagreement is narrow, the parties may be so rooted in their respective positions that reason alone will not persuade either or both to move. In those situations the use of coercion must be considered and squarely faced in the early prebargaining preparation phase.

Another important consideration for planning purposes in anticipating bargaining outcomes is to remember that one is dealing with a multiplicity of issues, several of which may have inherent negative settlement possibilities, and others of which may have positive settlement possibilities. The planning of specific table activities, especially in the area of attitudinal structuring and intraorganizational bargaining, must take into account how these mixed outcomes are juggled to advantage.

The first thing to be assessed is constituent support of issues that have negative settlement possibilities. What issues are a high priority for the constituent group? What issues are of a low priority? Next, the bargaining leadership preferences need to be assessed in light of these constituent preferences. Close analysis of these factors will provide insights into specific bargaining strategies that need to be employed.

In addition to assessing constituent preferences on issues that have negative settlement possibilities, an assessment of trade off possibilities between issues for the purpose of structuring the opponent's attitudes favorably should be made by bargaining planners. This will obviously involve some change in preferences, but will be done only if advantages can be gained from such change. Bargaining planners are simply saying, given the range of issues we have where the potential of impasse exists because of our objectives and the assumptions we have made about opponents objectives, where can we alter our preferences on low priority items in exchange for narrowing the impasse gap on higher priority items?

These are only some of the uses to which a proper anticipation of bargaining outcomes can be put. As you use this process, the horizon of uses will broaden considerably. The point is that there should be close analysis of all the factors.

As a final warning, keep in mind that although I encourage a process for anticipating bargaining outcomes prior to sitting down at the table I am not encouraging table bargainers to be passive pawns to a preordained fate. I suggest the method only as a basis for sound planning not a scenario for a Kibuki dance ritual at the bargaining table. I expect preferences will change in relation to what occurs at the table and they ought to change as circumstances dictate. But the changes will be better programmed if preferences are clearly articulated in the first place and relatively correct assumptions are made about the opponent's preferences. It is a common fault of beginning bargainers to have their target points suddenly become their resistance points because they become wrapped up in their own rhetoric at the table. Careful preparations beforehand along the lines suggested here should forestall that from happening and prevent bargaining chaos.

12. PSYCHOLOGY OF NEGOTIATIONS II

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The Psychology of Collective Bargaining is a relatively broad topic. It could, conceivably, cover almost every aspect of collective bargaining as I know it. Since the Center has invited me, a practitioner, I assume that what is wanted are some of my own views about collective bargaining in a higher education setting, and not a learned treatise of human behaviour at the table.

I am not going to tell you what to do if X happens or how I feel at the end of a long negotiating session. There are no "how to" books for negotiating. There are books that can help you hone skills, that can describe the parameters and that can make suggestions on moving from confrontation to problem solving relationships. But there are no computer programmes for reality, at least not yet. I am going to focus on the bargaining setting first, and then talk about the type of characteristics or behaviors that are successful in this setting.

It is common place to say that bargaining is as natural to human beings as eating. But collective bargaining situations in a union setting differ from other bargaining situations that we know. Certain bargaining styles, for example, are proper in a non-union setting, those that we often called binding supplication or collective begging. Other styles are more conducive to situations where there is a legal requirement for the parties to negotiate. Although an experienced bargainer can probably adapt to either setting, this is usually not the case for non-professionals. Power distribution is the key variable that, in my view, makes these situations different. You can't talk about bargaining behaviour, let alone understand the psychological dimension, unless you understand the setting. In other words, the setting sets the parameters for successful behaviour.

The Legal Compulsion to Bargain

Although I restrict my comments to the union setting, for clarity I want to draw a sharp contrast between union and non-union bargaining situations. In a non-union setting the parameters of the situation tend to dictate that the employee bargainers spend considerable, if not too much, effort in making their proposals sound as if no real changes would occur in management's power. The major reason for this is that management is under no obligation to bargain. In most non-union situations, management knows that there is an implicit and potentially effective threat that it can withdraw from the agreement to bargain. This tends to move the "compromises" towards management's positions. In such a situation, a petitioner's, adopting the behaviour of a supplicant is often optimum (and is viewed as reasonable) behaviour.

In a situation where the law requires bargaining, the power is more evenly distributed and there is no need for the employee bargainers to adopt a supplicant position. The rationale in this situation is to allow each party to define its own needs and its own positions. Compromises will come, if at all possible, from the understanding each party has of the other's concerns, needs and power.

Power Relationships

There has been a lot of interest in models of collective bargaining that emphasize problem solving and not confrontation. Let me say that I am in favour of the problem-solving approach. Power is the key to the bargaining model, be it problem-solving or confrontation, under which you operate or wish to operate. To hope for some form of enlightenment is, in my opinion, foolish. I should point out that power is not like a sum of money. It is not always a single amount that you possess on each and every issue. Power varies, not only in relation to specific issues, but also in relation to what has already been settled. If power is not more or less evenly distributed, problem solving bargaining will not and in fact, cannot, really occur. At best, without such a distribution, co-option of certain employee representatives is the probable outcome. The major reason for this is that the parties play different roles and do so because the pressures, the milieus and the functions of the positions of employee and employer are basically different, even if they do overlap in many instances. In fact, the definition of adversarial that I use in based upon this: an adversarial relationship is one that exists where the interests on such matters as salary and layoffs are not identical. Only if the parties to bargaining perceive each other as more or less equals in power or potential power, however, will problem solving not only be a viable method of bargaining, but even a [illegible] possibility.

To understand the psychological dimension of bargaining, it is important to understand that for serious and meaningful collective bargaining to occur in most, but not all, situations, management must be compelled by law to bargain; that is, to recognize the legitimate power of employees. This legal requirement is essential to any meaningful labour relationship, at least any I know. This does not mean that management is inherently dictatorial or congenitally destined to act in an arbitrary manner. Rather, it is simply to observe, that unless there is a reason for management to "share" power in an institution, it won't.

If you like, this is the North American political reality, not only in Washington and Ottawa, but also in all of our major institutions, such as the university. In fact, statutes regulating labour relations are efforts in conflict management. In other words, they recognize that the employee-employer relationship is one of conflict. It is the legal compulsion that brings the parties to the table and that regulates the power each party possesses.

As higher education collective bargaining in Canada is a recent phenomenon, our conceptions of bargaining and our bargaining behaviour are often immature. For example, in some institutions, university presidents think that the team is there merely to make recommendations for his or her consideration. The President may want to keep a close eye on the negotiations and may not want to give the management team very much authority. Each team, however, needs enough latitude to fashion an agreement without having to seek permission on each and every item; it needs the power to bargain. To do otherwise is to invite problems. The other party will inevitably lose patience and respect and, in all probability, this type of behaviour will harden its positions.

To recapitulate, the underlying dimensions of collective bargaining, are: (1) roughly equal distribution of power, (2) regulation of conflict that can come from clashes of this power, and (3) the teams' ability to fashion an agreement.

Qualities of the "ideal negotiation"

It is within this structure that collective bargaining has to occur. You must find people who can survive in such an environment. From my vantage point, this often appears to be no mean trick, given that, in many instances, teams are selected from groups who rarely have any collective bargaining experience.

In my view there are a number of qualities that you might consider when looking for a negotiator.

First, you of course look for someone who possesses common sense and intellectual independence. But beyond this, you want someone who is bloody-minded, that is, can at the right time be "nasty brutish and especially short" and yet not be disagreeable. You are at the table to get an agreement, not to move history to its inevitable conclusion discuss the moral underpinnings, or lack thereof, of being a member of either management or union. No one wants to be lectured. If you want to use the negotiations as a place for problem solving, then avoid the temptation rampant in higher education bargaining, to revert to lecturing the other party. No doubt this is an occupational hazard. There is an important and very subtle difference between enlightening the unwashed and bargaining (academic deans are not infrequently guilty as charged). Remember, there are no tests at the end of a bargaining session.

Second, find someone who has a considerable amount of self-control. There is a time for a sharp reply, losing your temper may make you feel better, but you probably will have lost the point you're trying to make. This quality is necessary as higher education bargaining teams often have not developed sufficient skills to carry on a difficult set of negotiations. Without self-control, and lacking experience, higher education bargaining can become plagued by self-righteousness.

You don't want a debating society alumnus. Rarely will the various audiences to bargaining decide or adjudicate the outcome. You may be particularly persuasive, but are probably still not going to get everything you want. If you can't retreat gracefully, find another line of work.

Normally, only when the two teams respect and trust each other (notice I didn't say like or admire) is a lasting agreement possible. I 'm not adverse to confrontation if I think it is necessary, but I know that such confrontation will affect my members' view of this management for some time to come. Without becoming maudlin, it follows that you must find someone who likes people. Avoid those who are clearly better than the rest of us poor mortals.

Third, you want someone who is what I call an active listener; someone who can analyze what is being said relatively quickly, ask the appropriate questions and isolate

the areas of current agreement, potentials agreement and disagreement on a clause by clause basis. Chief Negotiators must have the skill to draw out the position of the other party. Sometimes, in higher education bargaining, because of our inexperience or philosophical hangups, these positions are not always expressed very well. "Management right" or "No" are in my view usually in this category of poorly or inadequately expressed replies.

What happens around the table during the negotiations is not personal; if you pick someone that is on an ego trip, fire him or her quickly. It is not a test of wills, nor is it a question of who can out stare the other. The Chief Negotiator must be someone who doesn't see this as a win/loss situation. Frankly, it's a job.

Fourth, if it is not clear by now, patience is another quality. Within the structure I have described, a lot of time seems to get wasted because the parties go over and over the same ground. But this is necessary as each party begins slowly to understand the other's position, what each can live with, and the nature of trade-offs and packages of trade-offs.

Seeking compromise requires flexibility of mind. Bargaining strategies and positions have to be reassessed on a regular basis. Bargaining is not a game like chess or poker. The rules are necessarily flexible in order to meet each and every contingency. By allowing the other party to define its own concerns, even if you need to help with some questions, you may gain enough information to allow you to alter positions. Normally it can be said that both parties have principles and legitimate needs. Don't attack the integrity or call the other team unprincipled except where the other party has no intention of bargaining in good faith. In these instances the issue has gone beyond what can be usefully done at the table in any event. It's sanction time.

Unfortunately, this paper has not provided you with a basic "how to, if and when" guide. But then, I always get itchy when someone tells me he can teach people to bargain. They are like marriage counsellors who are into their sixth marriage. It is possible, however, to provide courses that expose people to some of the variables one might find at the table, and to help sharpen negotiating skills by removing some of the rough edges and warts on an individual's style. Nonetheless, there is no magic recipe for collective bargaining, no more than there is one for any other human relationship. Collective bargaining is just a forum for solving problems and for managing conflict. It is no more, no less.

13. UNION LEGISLATIVE AND POLITICAL COOPERATION IN THE 1980's I

TOWARDS A COLLECTIVE BARGAINING ALLIANCE IN HIGHER EDUCATION

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"American trade unions distinctively rely on collective agreements rather than legislative action to improve wages and working conditions."[1] This reliance is necessitated by a legislative weakness grounded in the absence of a labor or democratic socialist party and the corresponding pervasiveness of anti-government doctrines. Conversely, the European pattern "tends to put much less emphasis on job control at the

work-place level than is true of most bargaining in the United States."[2] In the current American setting, therefore, both the limited prospects for legislative action and the desire of academic unionists to enhance such elements of "job control" as academic freedom, peer review and faculty governance require that collective bargaining not legislation constitute the principal focus for cooperation.

The Limits of Legislative Cooperation

Our common agenda of legislative reforms is lengthy, critical and virtually irrelevant for at least the next four years. Who expects to achieve labor law reforms--such as the reversal of Yeshiva, or minimum national public sector bargaining rights, or expanded educational and research support, or effective affirmative action programs in the current political climate? Certainly we must unite to resist attacks on existing funding, the tuition tax credit, and academic freedom. But if we are not to consume our energies, resources and future promise in defensive struggles, we must explore more fundamental forms of cooperation than the momentary alliances characteristic of legislative activities.

Education funding, for example, is a severe problem at every level of government and in the private sector as well. It is, strictly speaking, neither a legislative nor a collective bargaining problem, but rather a fundamental social problem. Tactically, we should encourage cooperative legislative and community activities; strategically, a fundamental social and political realignment including an enduring alliance among higher education unions is the precondition of effective legislative activity. Needs do not inevitably produce their solutions. Economic stringency may, in practice, stimulate conflict between the universities and the schools, public and private education, and so forth. Without the moderating constraints of organizational unity, legislative and programatic concerns may destroy rather than strengthen cooperation as has been evident in past disagreements over funding, public employee bargaining legislation, affirmative action and the Department of Education.

The Yeshiva problem offers another illustration of the need for continuing alliance. Professor Douglas has offered some direction for our panel through his observation that the Yeshiva decision has led to a concerted effort by our respective legal staffs and "that a successful effort might lead to expanded areas of union cooperation in the 80's."[3] Unfortunately, the judicial approach is slow, costly and of uncertain benefit. Legislative remedy is not on the federal agenda for the foreseeable future and unavailable at the state level due to federal pre-emption. It is useful to remind ourselves, therefore, that private sector bargaining preceded and fostered the Wagner Act and that public sector bargaining often precedes and shapes state legislation. Inter-union cooperation in support of demands to establish and maintain unit recognition, including strike support and related legal defense, is more critically required than an may effectively contribute to legislative and judicial reform. Since such cooperation implies strengthening a particular bargaining agent, substantial cooperation is unlikely absent organizational unity.

Legislative cooperation and conflict will continue to correlate with our particular and diverse organizational interests unless and until we establish a common organizational forum through which diverse concerns can be incorporated in a democratic consensus. Though I conclude this section with the obligatory expression of pious hope for every possible cooperation in the legislative setting, I am convinced that effective legislative cooperation awaits effective organizational integration.

A Foundation for Political Cooperation

Collective bargaining representation, under the American system of exclusive representation, does not self-evidently require inter-union cooperation. Intense organizational rivalry with little respect for jurisdictional or political constraints pervades the public sector and may even stimulate the growth of public sector unionism. If resources are squandered and opportunities wasted through these rivalries, and they are, it is also true that competition frequently contributes to union democracy, responsibility, and effectiveness. Had the AFT and NEA not sought to extend collective bargaining to higher education, the AAUP might still regard collective bargaining as unprofessional and inappropriate to the university. If the AAUP had not responded with a competitive decision to embark on collective bargaining we might all have foregone the distinctive qualities of higher education in exchange for contracts modeled on the primary and secondary schools. Diversity has allowed local faculty groups to fashion affiliations and alliances appropriate to specific colleges and universities in specific geographic and political settings. Conversely, some efforts to achieve unity through joint affiliation have perpetuated the factionalism they were intended to resolve. Even an organization like the Conference of Academic Unionists in Public Higher Education is no more a corrective of factionalism than it is a reflection of inter- and intra-union disagreements.

The one foundation for organizational alliance which transcends the genuine benefits of diversity and competition is the preservation of professional standards through effective pattern bargaining. Compensation bargaining does not require unity; whipsaw and piggyback techniques are often more effective. But professional standards are accepted as such only if they are widely adopted and respected in a reasonably uniform manner. It is unlikely that university administrators, or arbitrators, or judges will uphold claims of professional standards if we are inconsistent in their defense or show a propensity to trade them off for economic gains. The issue of whether the professional standards, which the AAUP established with some success prior to collective bargaining, will gain enhanced acceptance as "the common law of the shop" under collective bargaining remains to be determined. History is not on our side.

For many among us, loyalty to the union movement implies a commitment to industrial unionism and a deep distrust of craft and -- by inference -- professional unionism. This attitude reflects the pusillanimous behavior of the AFL from the defeat of the great steel strike to its resurgence in the late 1930s. What we neglect, and what labor historians like David Montgomery are now rediscovering for us, are the "powers which working people have lost in this century, ... of worker's regulation of hiring, work arrangements, and dismissal which have been vanquished in the name of progress ...."[4] Craft unions in 19th Century industry, like a remaining few in the contemporary trades, possessed substantial control of the work process. When these unions were destroyed by a combination of economic and managerial forces not unlike those pervading higher education today, the industrial unions, which eventually replaced them, achieved substantial non-economic as well as economic benefits but never regained control of job and personnel standards. Professional unions will fare no better, especially in view of the emergence of legal restrictions on the scope of bargaining, without a concerted and self-critical effort to preserve and enhance professional standards.

Self-criticism is especially required to ensure that the necessary transition from association to union organizational structures and procedures does not erode professional orientations. The inadequacy of the association structure is apparent to most persons active in collective bargaining but requires emphasis since it is not always obvious to our non-bargaining colleagues. Professor Stieber's comment should suffice.[5]

> It takes more than a constitution, a Washington office, and occasional policy statements to make an effective national organization. Among other things, it takes a belief on the part of the members that their common objectives are more important than their differences. Equally important is the willingness to back up this belief with funds, a full-time staff, and authority for elected officials to execute policies established by the national organization.

On the other hand, the amateurism inherent in the association model due to leadership turnover, reliance on volunteers and staff recruitment based on professional rather than collective bargaining experience is appropriate -- unless and until there are sufficient individuals possessing electibility, professional experience, bargaining ability, and a desire to work for, rather than as, faculty. At this formative stage of our development, when we have yet to standardize and institutionalize professional values through collective bargaining, academic professionalism is more important than union professionalism. Similarly, relatively democratic structures, substantial local autonomy and volunteer staffing may all be required to ensure institutionalization of appropriate academic standards.

The same commitment to professional standards requires the controversial and painful observation that it is more important to strengthen our ties with our non-bargaining colleagues in colleges and universities than our union sisters and brothers in the primary and secondary schools. In my view, cooperation and alliance among all educators is possible and desirable, but a clear demarcation of political authority, budget and staff are essential to the fulfillment of our complementary but distinctive purposes.

In sum, concerted effort involving each of our national organizations and representing the concerns of the non-bargaining as well as the bargaining faculties is required to maintain and strengthen national professional standards. This is especially true at a time when the poor market for many academic disciplines reduces the number of faculty who can protect standards through their individual refusal to work at non-complying institutions. Collective action is essential and the broader that action the greater the likelihood that we can establish effective patterns of professional standards across the nation. This depends, of course, not only on establishing substantial unity but on achieving unity in a manner which reflects and sustains the professional objectives we seek.

Toward a Collective Bargaining Alliance

Present tendencies toward organizational integration, including actual joint-affiliations and various informal discussions, consist almost entirely of bilateral arrangements linking the AAUP with either the AFT or the NEA. This reflects, in part, the deep division between the NEA and AFT. It also reflects the AAUP's effort to balance its NEA and AFT ties so as not to be subsumed by either and the inability of the AAUP, thus far, to achieve a membership consensus in support of any particular reorganization. Unhappily, two-party agreements will not provide comprehensive unity or ensure comprehensive adherence to national professional standards. Moreover, they are as likely to stimulate as to reduce wasteful rivalry.

This is reflected in the current trend toward bi-lateral joint affiliations by large local bargaining units. It is also apparent in a shift from joint NEA-AAUP efforts toward joint AAUP-AFT affiliations. Two NEA-AAUP units have voted to end joint arrangements: Kent State, now AAUP; Northern Iowa, now NEA. The Hawaii system -- including graduate, four year and two year campuses -- is the only remaining NEA-AAUP bargaining unit; the diversity of this unit provides both the basis for and the source of dissatisfaction with this alliance. Potentially the most important AAUP-NEA alliance is the Congress of Faculty Associations which includes a third party, the California State Employees Association. The CFA has a reasonable prospect of winning bargaining rights for 11,000 faculty in the state college system following a recent favorable unit determination. If, however, the difficulties due to different organizing styles and resources which undercut AAUP-NEA efforts in SUNY are not overcome in California, the resultant AFT victory would shift the balance of remaining alliances strongly toward the AFT.

Although AFT-AAUP alliances have been fewer and later, the scale of the two major recent agreements in Pennsylvania and New York City, and the mutual awareness of the possibility of future similar agreements has created strong momentum toward a national AAUP-AFT alliance in higher education. The AAUP shift toward the AFT began with the NEA's inability to satisfy the Association of Pennsylvania State College and University Faculty's desire for greater budgetary independence from the PSEA and the consequent decision of APSCUF to become independent and then jointly affiliate with AFT and AAUP. The inability of the NEA to limit the role of its constituent state associations has certainly created the principal obstacle to NEA participation in higher education alliances. The growing acceptability of AFT alliances within the AAUP, however, reflects a realization that the AFT's representation of several graduate institutions has encouraged the AFT to orient its standards and staff more toward higher education than yet seems the case in the NEA. Nevertheless, if the existing bi-lateral arrangements between the NEA and AAUP fail and those with THE AAUP-AFT continue to grow, the resultant bilateral alliance is unlikely to achieve higher education unity or comprehensive adherence to professional standards.

The NEA will not leave the field to the AFT regardless of its allies. More importantly, the image, membership (in and especially out of collective bargaining units), and effectiveness of the AAUP would be adversely affected by an AFT-AAUP alliance. A national NEA-AAUP alliance would probably have less detrimental organizational consequences to the AAUP in the short run, apart from the loss of AFT affiliates, since many faculty in the AAUP perceive the NEA as more professionally oriented than the AFT. For this reason, a national NEA-AFT alliance is the more attractive to some AAUP leaders, especially among those not engaged in collective bargaining, and is an intermittant topic of discussion. If, therefore, the NEA is able to provide flexibility regarding state dues and uni-serve arrangements and to insulate constitutionally higher education from the overwhelming preponderance of K-12 members, they may well reverse the current trend toward AAUP-AFT alliance. Nonetheless, such a national bilateral arrangement between the AAUP and NEA would omit a very substantial proportion of organized faculty and, therefore, neither end rivalry nor assure uniform commitment to professional standards.

Faculty in higher education require a comprehensive alliance which includes the three principal bargaining organizations and the non-bargaining faculty. An alliance would be more practical and appropriate than a unified organization. None of the three bargaining organizations is currently prepared to give up its existing members nor can organizational loyalties swiftly disappear. The alliance must provide representation for non-bargaining faculty because they remain a majority whose actions are critical to the maintenance of national standards and because the Yeshiva decision and the absence of national public sector bargaining legislation will deny bargaining rights to many faculty who would otherwise seek to organize. An alliance is more appropriate than a unified organization because it will permit a healthy diversity and orderly competition beneficial to democratic and effective unionism.

Although a new organization is not entirely impossible, it seems wiser to employ the AAUP Collective Bargaining Congress -- with appropriate restructuring -- as an umbrella organization for the alliance. Since both NEA and AFT affiliates currently participate in the AAUP and its Collective Bargaining Congress without lessening their alliances with the AAUP, such a development seems practical as well as mutually desirable. It also offers the best prospect of sustaining a distinctively higher education organization, policy and non-bargaining membership. The success of such a venture depends on whether there are conditions under which the NEA and AFT would agree to a comprehensive and mutual arrangement. It also requires that the AAUP not only support the venture but establish policies and mechanisms to accomodate a massive influx of collective bargaining members without sacrificing its historic principles or its non-bargaining membership.

It is impossible to foresee and discuss herein all the problems and potential solutions which may arise in the course of the complex negotiations required to create such an alliance, but the following considerations are likely to be among the central concerns:

1) Existing certified bargaining agents would ordinarily retain their current affiliations and add an affiliation to the AAUP on a fractional dues basis similar to current arrangements.

2) Collective bargaining affiliates would jointly form the Collective Bargaining Congress or Alliance of the AAUP and fashion its by-laws and policies.

3) Affiliates could alter their affiliation under established law and subject to mutually agreed policies. Competition for certification could also continue subject to law and such policies of mutual restraint as might be agreed.

4) The AAUP would coordinate the development of collective bargaining policies. Each organization would provide such membership services as it determined through its constitutional procedures, but efforts could be made to negotiate special service arrangements and avoid unnecessary duplication.

5) AAUP would reorganize its governance structure to achieve a mutually satisfactory accomodation of collective bargaining and other interests. This might take the form of delegate voting by unit and election of officers in convention; this method is currently used within the CBC to avoid the excessive influence a few chapters would hold given directly proportional voting. Alternatively, the AAUP could bifurcate and create a quasi-independent board to establish and administer professional standards. AFT and NEA would not need constitutional revision, as they would if AAUP were to become the higher education arm of either and require constitutional insulation. The NEA would, however, experience substantial pressure to create more flexible state dues and uni-serve arrangements.

6) AFL-CIO membership might remain a local option acquired through AFT membership or be subject to a general referendum at some specified future time assuming some form of direct affiliation were negotiable.

The flexibility inherent in such an alliance would probably increase its attractiveness to many faculty who share the unshakeable conviction that their campus is unique. At the same time, national coordination should moderate organizing expenditures and improve services. The relative advantage of these arrangements to NEA, AFT and AAUP depends, of course, on perceived needs and the precise outcome of negotiations but a balanced outcome seems feasible. The crucial benefit would be the establishment of an alliance fundamentally grounded in a distinctive commitment to strengthen professional standards in higher education. For only a concerted effort to protect academic freedom, faculty governance, peer review and related standards can ensure that academic self management rather than bureaucratic personnel management characterizes the campus of the 80s.

FOOTNOTES

1. Everett M. Kassalow, "Industrial Conflict and Consensus in the U.S. and Western Europe," in Labor Relations in Advanced Industrial Societies, edited by Benjamin Martin and Everett M. Kassalow; Carnegie Endowment, 1980, p. 45.

2. Ibid., p. 51.

3. Joel M. Douglas, "Faculty Collective Bargaining in the Aftermath of Yeshiva," Change, March 1981, p. 39.

4. David Montgomery, Worker's Control in America, Cambridge, 1979, pp. 153-4.

5. Jack Stieber, Public Employee Unionism, Brookings, 1973, p. 21.

14. UNION LEGISLATIVE AND POLITICAL COOPERATION IN THE 1980's II
THE PROSPECTS FOR FACULTY UNITY

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It is a distinct pleasure to participate in the Center's ninth annual conference, to share the podium with Professor Ernie Benjamin, whose incisive reasoning has contributed significantly to the development of academic collective bargaining in the United States, and to make a new friend, Chuck Olson of the National Education Association. I believe it is necessary even at the risk of belaboring the obvious to express appreciation for the Center's invaluable service in bringing us together at least once a year--faculty, administrators, scholars, union officers and staff--to reflect on the major issues confronting us and to learn from each other. The written evidence of the conferences, The Annual Proceedings, is becoming an indispensable record and source as the years pass. Our compliments to Joel Douglas and his staff for many jobs well done.

Before responding to Professor Benjamin's proposal for higher education alliance of the American Federation of Teachers, the National Education Association, and the American Association of University Professors under the "umbrella" of the AAUP, I would like to review briefly AFT's relations with the NEA and AAUP.

During the past year a measure of common legal strategy to cope with problems arising from the Yeshiva decision was devised with evident good will on the part of all three organizations. This well-intentioned plan suffered, however, from the widespread epidemic of Yeshiva-generated difficulties on the campuses of the nation's private colleges. It would have required at least one staff member working full-time simply to coordinate the joint effort, because there were so many developments in so many places--from Albuquerque to Maine to Florida.

Legislative Cooperation

The AFT's publicized policy differences with the NEA are important, but, on the other hand, they tend to be overemphasized in the heat of competition. For example, on the legislative front AFT and NEA positions agree more than 80 per cent of the time. Currently both organizations are vigorous partners in the Committee for Full Funding of Education Programs, a major coalition working to prevent the Reagan administration's withdrawal of federal support for education. This is not a "momentary alliance." And I should remind the conference that NEA and AFT share a bargaining agent in one of the

nation's largest cities, Los Angeles. Granted, it may be rather lonely in that unique status.

AFT and AAUP share many of the same legislative objectives; that was obvious in March when Irwin Polishook, AFT Vice-President and President of CUNY's Professional Staff Congress, and AAUP General Secretary Irving Spitzberg testified before the House Subcommittee on Post-Secondary Education. The most notable step toward unity among the three organizations in several years has been the recent affiliation of the Professional Staff Congress of CUNY--an American Federation of Teachers/New York State United Teachers local--with AAUP. APSCUF--the faculty's union in Pennsylvania's state colleges--achieved a dual affiliation with AFT and AAUP not long ago. The two organizations now share between 12,000-13,000 members in those two bargaining units.

Another important action occured very recently when the AAUP's Collective Bargaining Congress Executive Committee passed resolutions expressing its opposition to decertification efforts by anti-union members of the faculty and academic staff at Florida State and the University of Florida. The AFT's United Faculty of Florida is the bargaining agent in the nine-campus State University System of Florida. This evidence of solidarity is quite encouraging to those who desire greater unity and less organizational rivalry.

There are other examples of cooperative efforts. In Texas the unaffiliated statewide organization named the Texas Association of College Teachers is attempting to have working relations with all three national organizations while at the same time maintaining its independent status: that is a tall order even for Texans.

Organizational Competition

As Professor Benjamin has observed, almost all of the joint ventures have been bilateral arrangements. An exception is the three-way venture of AAUP, NEA, and the California Employees Association in an organization called the Congress of Faculty Associations, which is competing with the AFT's United Professors of California for bargaining rights in the huge California State University and College system. This competition appears to have at least partially paved the way for a proposed unit determination decision that will divide the faculty and professional staff into four separate units--an arrangement that does not promise unity but discord in that academic community. I suggest that organizational rivalry is a cause, because the hearing officer seems to have followed in a general manner the unit recommendations of the Congress of Faculty Associations and the system's administration, and not those of the United Professors of California, who argued for one large unit. Further, the special language regarding the composition of units in the legislation for the University of California system--that which establishes an academic senate unit--is attributed to the influence of AAUP and Berkeley Faculty Association leadership. Whether that position grew out of a concern for the professional standards emphasized by Professor Benjamin, or out of organizational self-interest, or both, is a question for historians to answer.

My point is that organizational competition in California may divide the faculty and staff in a crucial and painful way. The 20,000 would be better served by a unified organization of AFT, AAUP and NEA members, particularly the several thousand part-time and non-tenure track instructors.

Ambrose Bierce, not a figure from the history of labor relations but a satirist of considerable talent, observed that politics "is a strife of interest masquerading as a contest of principles." This appearance-and-reality approach suggests that it is a convergence of interests (as Professor Polishook emphasized yesterday morning) that must be discovered and recognized before the harmonious integration of principles and policies can be composed. If one considers the joint ventures which have emerged so far, one finds their origin at the local level: the drive for unity was initiated and sustained by the membership at its structural base. In the cases of the Professional Staff Congress, APSCUF, University of Northern Iowa, Hawaii, and Kent State, which have been the principal multi-organizational unions, movement was compelled by local officers and staff. And, where the ties unravel, as they have at Kent State and Northern Iowa, it is dissatisfaction experienced by the members and their leaders at that level which has been at the heart of the matter.

If the common ground hasn't been discovered at the campus level, vertically imposed alliances or coalitions--top down--are not likely to materialize. This is not to argue that national leadership of the most imaginative and intelligent type is not needed, nor to dismiss the national perspective presented by Professor Benjamin. The American Federation of Teachers in its college and university manifestations, as in its development in the public schools, is an organization of strong locals: we would expect their direction to be critical. In the recent PSC affiliation with AAUP--although national leadership and staff were involved--ultimately it was the Professional Staff Congress that drove negotiations to a successful resolution.

Toward A Unified Structure

One path toward a unified structure is the inch-by-inch advance of negotiations. An organization introduces a proposal clearly in its own interest--a position of assumed strength--and waits for the other party to respond with its own advantages in mind. This is a reasonable course: we in this room might regard it as the primary rhythm of action. But this is a very large country, education faces many problems, and most of us are extremely busy. If we are not careful, we will all be too ensnared by our daily tasks to find seats around a three-sided negotiating table.

Proposals that say, in effect, join us, whether in 1976 or in 1981, may be eminently logical negotiating proposals, perfectly orthodox, but--given regional differences, the accidents of history, suspicion, attitudes toward organized labor, the inevitable clash of egos at critical points - the AFT will instead propose a major step first: a good faith leap into middle ground. That is--one higher education organization of faculty and professional staff of AAUP, AFT, and NEA in the unionized and non-unionized sector of the profession. We know there are many obstacles in the way, but the stakes are high. The creation of a unified structure will require the finest leadership the three organizations have to offer, but we believe that the past decade has produced that leadership during a period of maturation for faculty organizations. We will need the best negotiators and the most effective political leadership to establish the arrangements for unity and insure its health, but most of all we need the wisdom to discover that our interests and principles will ultimately converge, that we are, in fact, a community, large and diverse, but still a community.

15. UNION LEGISLATIVE AND POLITICAL COOPERATION IN THE 1980's III

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Introduction

The subject of the plenary session today is the area of potential cooperation among three faculty organizations. Before I discuss the three labor issues I feel are most urgent, I want to provide you with a backdrop of what I feel is a realistic view of Washington organizational politics. Cooperation among organizations advocating similar federal policy would appear to be a natural phenomena. Most educational employee organizations--teacher unions if you will--have similar policies and a need to accomplish them for their members.

However, each organization represented today has been a competitor with the others for the right to represent higher education faculty at the bargaining table in the state legislature and in Washington. During a bargaining election how well we cooperate with each other and our similar position is less important than our relative strengths. In fact, it is our uniqueness which we stress and our organization's distinctions, not necessarily our similarities. After all, losing an election--which each has done--is to lose members and that translates into a loss of power and dollars to pursue organizational goals.

There is an amazing amount of joint activity among our organizations. The NEA, AFT and AAUP are members of many coalitions built around the goals common to the three organizations. But the assumption that there is cooperation within a coalition is not necessarily true. There is a distinction between coalescence and cooperation. In a recent--supposedly joint--effort a coalition was formed. Twelve organizations were

invited to join and about twelve or so more invited themselves. There were five major education organizations among the twenty-four groups. As the coalition activities progressed, one of the two founding major organizations lost interest. Another of the major organizations began to play two ends against the middle. The upshot was that the coalition coalesced, but the organization didn't cooperate.

The realities of lobbying are that there is no single corporation, labor union or trade association, in Washington which can consistently get its legislative agenda adopted by Congress. There are indeed many organizations which have the power to kill or severely cripple legislation within its sphere of influence. Generally speaking, there would be no need to coalesce or cooperate if an organization could do it alone. But few can, so coalitions exist. The current Congress seems bent upon enacting a major portion of the Administration budget proposals. Never in my ten years of lobbying Congress is there more need to cooperate. If the Reagan proposal is adopted, education programs will be crippled or killed. Most organizations have spent decades building these programs. The time has come to fight a common enemy so we can live to battle each other again. I believe we must cooperate more now than ever before.

Critical Issues

A. Collective Bargaining Legislation

Now I want to discuss some labor issues which I feel warrant joint effort. There are three important labor issues which must be pursued. The first, Collective Bargaining legislation, is not likely to be on the national agenda during this Congress. The second is Social Security legislation which is a current issue and one which will affect all educators. The third is the 1982 general election.

For the past ten years, the NEA has sought a federal law to guarantee collective bargaining rights for public employees. Prior to the 1975 National Leauge of Cities v. Usery decision, our approach was to persuade Congress to enact a preemptive law to make the NLRA available to public employees. That decision by the U.S. Supreme Court caused the NEA to shift its strategy because many members of Congress reasoned that a federal collective bargaining law for public employees would be unconstitutional since the court ruled that the federal government couldn't establish and enforce a minimum wage for state and local public employees. The decision is based upon the Commerce Clause of the of the Constitution and the fact that the FLSA gave states and local governments no alternative choice.

A new approach has been designed utilizing the First and Fourteenth Amendment and the Spending Powers Clause of the Constitution as well as the Commerce Clause. The Fourteenth Amendment provides Congress the authority to enact legislation to enforce the amendments' ban on discrimination. It speaks to freedom of association and speech--as does the First Amendment. The Constitution provides Congress with the authority to set and collect taxes and to redistribute the revenues to meet the needs of the people as determined by Congress. The authority of the "Spending Powers" Clause allows Congress to establish guidelines or conditions as to how the money is to be spent. Most states accept the guidelines but they are not bound to. Therefore, states have a choice. If Congress were to establish that a state must enact a state collective bargaining law for public employees which met certain federal criteria before a state could receive federal aid which is used to pay these employees, the state has a choice whether to enact such a law. If it enacts or maintains a law which meets federal criteria, federal funds would flow. If it chose not to enact or maintain such a law, no federal dollars associated with the enacting legislation would be paid to the state.

For our purposes the most notable "Spending Powers" approach enacted by Congress is the Urban Mass Transit Act. It guarantees public transit workers the same bargaining rights as they would have if they were employed by private transit companies. In other words, it guarantees them the right to bargain if the state accepts urban mass transit funds.

One of the proposed criteria for a new Federal Act is that supervisory personnel would have the right to bargain. They would be treated in much the same was as professional employees are treated under the NLRA. This would resolve the Yeshiva problem because it would allow supervisory personnel--university faculty as determined by Yeshiva--to form and join unions and to bargain contracts. It would exclude executive level staff like deans, vice presidents and presidents but include all other university and college faculty.

The prospects for passage of any federal bargaining bill are not good. The mood of the Congress is to diminish federal involvement. However, times and attitudes do change. There is a need for a federal structure and we as organizations must be ready to act. Our agenda is to place collective bargaining on the congressional agenda.

Collective bargaining legislation is of premier interest to all these organizations because much of our service to our members is through bargaining and grievance representation. Because of this interest, each organization may first attempt to protect itself against any advantage a proposed law would give to its competitors. Getting all major public employee unions to support a single bill will take a lot of work and compromises. Right now the pressure upon organizations to support a specific federal approach may not be great enough to force any real cooperation. However, once the attitude of Congress begins to turn, it is more likely that unions will agree to cooperate.

B. Social Security

The Social Security Subcommittee of the Ways and Means Committee is considering some drastic changes in Social Security. Some of the changes are being made to satisfy budget cuts. Others are being proposed because the subcommittee feels that this is a good time to make these changes.

There are four Social Security issues of major importance to public employees:

- Raising the retirement age for full Social Security benefits to age sixty-eight.
- Continuing the spousal pension offset for women but delaying its implementation for another five years.
- Phasing out student benefits.
- The "Mega Cap".

When Congress first enacted Social Security legislation, it chose the age sixty-five at which full retirement benefits would be paid. Age sixty-five was rather arbitrarily chosen but has become the accepted retirement age for most public and private retirement plans. NEA policy states that the retirement age should be lowered. Indeed, one of the issues in the French election this last weekend was to lower the retirement age of French workers in order to provide more jobs.

The House Social Security Subcommittee is proceeding in the opposite direction. The Committee says that raising the retirement age to sixty-eight would reduce the drain on the trust fund. Actuaries who are advising the Committee base their assumption on the current economic situation and assume that it will continue unchecked. It is possible, and hopefully feasible, that the economy will settle down and the change may not be necessary. NEA sees no reason for such a sweeping change at this time.

Since many retirement plans assumed the sixty-five retirement age from Social Security, it is very possible that state legislators and governors may push to alleviate state retirement fund appropriations and liabilities by attempting to raise the retirement age to sixty-eight. There are already too many pension plans which have not lived up to promises already made. This possible adjustment is absolutely unwelcome and unacceptable.

There are twelve states where all or part of the educational employees are not covered by Social Security. The 1977 amendments to Social Security brought about several major changes, including one that harshly discriminates against teachers who retire under a public pension plan and without Social Security coverage of their own. Sec. 334 of the 1977 law, known as the Government Pension Offset, provides that dependent's benefits payable to a spouse will be reduced by the amount of any governmental (federal, state, or local) benefit payable to the spouse based on his or her own earnings in noncovered employment. Women will be subject to the offset begining in December, 1982.

NEA opposes the pension offset because:

- no comparable offset is applied to persons working for a nonprofit organization as defined in Sec. 501(c)3 of the Internal Revenue Code.
- teacher salaries have been so low for so many years that teachers presently retired receive minimal benefits. The offset can pose a crushing economic burden on retired teachers.

NEA believes that this is discriminatory. We are seeking the outright repeal of the offset. The Committee has proposed an additional five-year extension of the effective date for women.

The Social Security Subcommittee is also proposing the elimination of all student benefits. This would be a cruel hoax on the nation's orphans and the children of deceased, disabled and retired workers. The issue is further complicated because the Budget and Appropriations Committees are proposing that Congress reduce funding and tighten eligibility for all student aid programs. The effect is that many students who

would go to post secondary institutions will be forced to stay home and very possibly forego the education and training they would receive to improve their productivity. Somehow we have to remind Congress and the nation that education is an investment in the future and not a welfare item. It costs the nation far less to educate and prepare people to hold productive jobs than to support them on welfare and in penal institutions.

The Reagan Administration is proposing an absolute maximum-or "Mega Cap" on all public funded disability benefits. The proposal would limit the amounts payable for all public sources including state and local public pension plans to eighty percent of the salary received prior to disability. The proposal discriminates against public employees because disability benefits are not. About eighty percent of all public employees contribute to their pension plans while less than twenty percent of private employees pay for retirement benefits. This proposal is absolutely falacious because it denies benefits which public employees have paid for. The so-called "Mega-Cap" must not become law.

C. The 1982 Elections

The 1982 general election may be the crossroads for American public education. The attitude toward education so far expressed by this Congress is far from satisfactory. The willingness of Congress to consider cutting Social Security student benefits while also reducing BEOG, GSL and other higher educational funding can only be described as callous and ill conceived. The mood of the public is to reduce government involvement but not to decimate federal social programs. The so-called electoral mandate has been well played by the media-conscious White House and has put Congress--espcially the Democrat-controlled House of Representatives-on the defensive. The Administration has convinced many members of the Democrat majority that to challenge the President's plan is next to licentious behavior. As Democrats succumb, education funding suffers.

The redistricting of Congressional Districts now underway in state legislatures holds the key to education funding. There has been a shift of seventeen House seats from traditionally liberal, education-supporting constituencies to more conservative areas. Meanwhile, over the past years the RNC has been investing literally millions of dollars into state legislative races so that the 1981 congressional redistricting will allow them to pick up the twenty-six seats necessary to gain control of the House.

Of the Thirty-three U.S. Senators up for reelection, twenty are Democrats, twelve are Republicans, and there is one independent. Those up for reelection include such good friends of education as Bentzen, Burdick, Kennedy, Melchor, Metzenbaum, Reigle and Sarbanes.

The current trend would indicate that many of these friends may not win reelection. They may well be replaced with senators like those who beat Birch Bayh, George McGovern, Gaylord Nelson, and Jacob Javits.

As a group we must work to identify, endorse, and support strong education candidates. We must push to build Political Action Committee funds. And above all we must motivate educators to vote and to vote for pro-education candidates.

Conclusion

Education is under attack. The attack is camouflaged as a move to cut federal involvement and balance the federal budget. The clear intent is to dismantle social programs which Congress has built over three decades. Our educational system is too important to allow it to be sacrificed because of an untried policy.

The inclination of organizations is to coalesce but not necessarily cooperate. If we don't cooperate, all of us will loose. A division in ranks of educators only helps those who would dismantle our federal support program and ruin education in general.

16. CONFIDENTIALITY AND DUE PROCESS I
PROFESSOR'S ACTING AS THE UNIVERSITY

James A. Dinnan
Professor
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As a Federal Judge enters his chambers he is an individual member of the society in which he is a part. When he dons his robe, a symbol of the segment of a balanced three part system, and enters into the court room, he is the Judicial System. It is not the room, or its furniture, that makes it a court of law, but it is his or her presence that represents the law. The Judge is guided by the rules set down by the society which empowered him. The ultimate guide is the Constitution of the United States.

The University System derives its power from the State in which it resides. That system is empowered to operate within a set of guidelines. These guidelines include a three part whole relative to the specific issues assigned to it. All operations are to be in complete accord with procedures that are used by the larger structure which empowers it. No criteria or procedure may violate the greater law of the land.

As a member of the University System enters into a chamber to perform a Judicial function, as a duly appointed member of a committee, he or she is the University. Collectively they perform a task at the University, using the guidelines established by the whole University unit.

In order for the system to function it must remain as a three part whole. If some other external force takes over the responsibility of any one-third of its rightful duties and responsibilities, then the system (as a three part whole) will cease to exist. The judging of peer qualification is a duty, if not a right, of the Faculty.

The basis for all systems within the largest unit is the three part system of government agreed upon by the society as a whole. The largest system has a set of general guidelines that are the model for all public rights and responsibilities, namely the Constitution of the United States and its amendments. Ultimately it must be the source of right.

The Constitution of the United States of America established the guidelines of "a more perfect union." These are the rules under which the largest body of the law of the land shall operate. Every lesser body empowered under this law shall be governed by the same principles and thus must also follow its suggested procedures.

The rights of the individual acting as the empowered body have been set forth in order to insure that unequal pressure from any external source is removed. As important as it is for Federal and State bodies to electively govern, it is even more important for a free system of education.

Article 1 section 4 states in reference to the individual, when acting as the body, "That in all cases except treason, felony, and breach of peace be privileged from arrest during their attendance at the session--and for any speech or debate in either house, they shall not be questioned in any other place." Our forefathers included this guideline to insure the freedom of ideas and principles in a forum dealing with the good of the nation.

Article 1 section 4 also includes the operation of an empowered body by setting rules for the proceedings. As a group of individuals form a body, the body then becomes one unit or committee and is acting as the law, receiving its power from the larger unit to debate and judge specific issues, such as the promotion and tenure of those presenting themselves for consideration at a college or university or other committees relative to its charge and duties. "Each house shall keep a Journal of its proceedings, and from time to time publish the same, excepting as may in their judgment require secrecy; and the Yeas and Nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the Journal."

A system of checks and balances should be available within the college or university system to ascertain if the correct procedures were used in arriving at a judgment. But the judgment of the issue lies in the whole unit that has as its sphere of influence the items granted by the larger whole, not in a state or federal court.

A federal or state court might be asked to review whether or not due process was violated but not to judge the fundamental issue of a candidate's qualification or if they warrant the granting or denial of promotion or tenure. That judgment belongs to the qualified facility of a given legally established college or university.

Thus, the promotion and tenure of a member of the University System must reside within that system.

In order for any individual to operate in a Judicial capacity within the legally empowered system at any level he or she must be protected from outside pressure. This right was established in the Constitution. A judgment about the issue before the body is given, and if there is more than one judge involved, the ballots are counted and the combined total number is revealed unless more than one-fifth of the body votes for individual disclosure. The individual rendered a decision based upon the facts presented and the privacy of that act belongs to the individual alone. A private (secret) ballot is the central core to all of the spokes of the system we live under. It is the point at which all power is equalized. Destroy it and the system will perish.

Sequence of Establishing the University System
as a Legally Constituted Body Within the
Framework of the Law of the Land

A. Establish the source of the rights and duties of the University System as an empowered legal entity within the larger structure. Present the guidelines for its operation. (The scope of its sphere)

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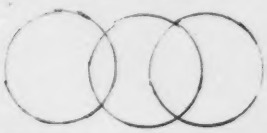

B. Establish the rights and duties of an individual or a group of individuals (committee) as they act as the legally empowered University System using the guidelines set forth by the whole system.

C. Establish the right of the Promotion and/or Tenure Committee as a legally empowered body to judge the issue relative to a person presenting themselves for judgment through the legally empowered guidelines.

17. CONFIDENTIALITY AND DUE PROCESS II

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The basic issue in the Dinnan case is the role of secrecy and confidentiality in the university. Some of us believe that governance in the university is not so fragile a blossom that it will wither under the gaze of public observation. The issue is both a moral and legal one; Judge Oliver Wendell Holmes used to say that it was inadvisable to combine moral issues with legal issues because you then get confused on both scores. That's not my view. I think we have to discuss them together....

We are dealing with an intricate issue of the moral law and the legal structure within which we operate. There is plenty of room for debate. Dr. Dinnan has done us all a great service by dramatizing the issue and forcing all of us to face up to it. It has been said that nothing so concentrates your thinking as knowing that you are going to be hanged. Unquestionably, when the instruments of the courts are used as they have been abused in Dr. Dinnan's case, we have reached the point where the time is ripe for us to clarify exactly what we believe in this area.

First, let me make clear that I speak only for myself and take sole responsibility for whatever heresies I am about to pronounce. These views are not those of any organization of which I am a member - not the National Center with which I have the honor to be associated, nor the Professional Staff Congress, nor the University Centers for Rational Alternatives, which incidentally has been very supportive of Dr. Dinnan's position, nor the view of the International Council on the Future of the University, nor any of the other groups to which I belong.

The Attitude of the Court

The reality, as I see it, is that we must confront the question within the framework of our contemporary culture. We must examine the extent to which society's new moral values, reflected in the legal positions that have been adopted in relation to issues of discrimination, have altered our traditional practices. Are we willing to face up t the new trends in our culture which, in my judgment, represent a higher level of concern?

Let me make it specific: no words can be too harsh or condemnatory for Judge Owens who fined and jailed Dr. Dinnan. Dr. Dinnan was testing an important legal question. Throughout the history of our legal institutions, society has respected the concept of the test case. The only way we can bring issues of this kind to the courts is for somebody to commit what is deemed to be a breach. Only a judge who was hostile - I think not only to the respondent in this case, but to the whole academic community - could have taken such vindictive action against the person of our colleague.

But that does not mean that we must necessarily agree with the logic that underlies his position.

Although I disagree with Dr. Dinnan, I want to emphasize that I admire his willingness to pay the price for his convictions. But as someone pointed out - I think it was Bernard Shaw - martyrdom is merely proof of a person's sincerity and not proof of the validity of his position. Socrates was willing to drink the hemlock - but that doesn't necessarily prove that his philosophical views are sound. St. Stephen was ready to bare his bosom to the stones and give his life for what he believed - but that doesn't prove the metaphysics of St. Paul. Rabbi Akiva permitted himself to be flayed by the Romans - but that doesn't establish the superiority of Jehovah over the pantheon of the Gods worshipped by the Caesars. The test of truth is impersonal. I hope that Dr. Dinnan, whose person I respect, will accept my statement of personal regard for him. After all, look at the company in which I've put him - Socrates, St. Stephen and Rabbi Akiva.

Four Issues

I have four reasons for disagreeing with Dr. Dinnan:

1. His position is based on the assumption that faculty members are lacking in moral character; if their behavior in Personnel and Budget Committees were public, they would act differently.

2. His position is based on bad sociology. It fails to recognize the social changes that have occurred in our society.

3. It is based on bad law.

4. His position flies in the face of what I consider to be sound management philosophy. As some of you may have heard, the Supreme Court says that college professors are managers. Of course, we have been called worse names than that. We were accustomed once to think of ourselves as priests at the altars of learning, but now we are told that we are managers at the counters of commerce. Not by the National Labor Relations Board. It is the Supreme Court that has imposed this industrial model on us. In any case, say it's bad management to have decisions made in camera, a method that may once have had merit but is incompatible with contemporary practice.

The Purpose of Confidentiality

Let me turn to the moral issue. We are told that secrecy is necessary because faculty committees and administrators who are engaged in making personnel decisions lack the character to make sound decisions in the glare of publicity. I believe it is the other way round: if they lack character so that they cannot make decisions on the merits when they are observed, then indeed it is essential that they be observed when they are making the decisions.

What was the origin of confidentiality? Whom was it supposed to protect? Those who sit in judgment or those who were being judged?

Take everyone of the legal relationships in which confidentiality is safeguarded - doctor and patient, priest and parishioner, lawyer and client, journalist and his source, although that's a qualified privilege. Who is being protected by the confidentiality? For example, are we protecting the doctor? No. The purpose of the confidentiality is to protect the patient who has the legal right to waive it. In the case of lawyer and client, heaven knows the the lawyers do need the protection but the purpose is to protect the client, and again the client has the right to waive. In the case of the journalist and source - who is being protected? We have just come through the scandal of the Washington Post and the Pulitzer Prize. Who is being protected? Not the journalist. If the source is willing to be identified, the safeguard ceases to exist.

There was good reason for confidentiality in the making of decisions about faculty: to protect the individual faculty member. That was the principal reason. But if the purpose of confidentiality in the academic community is to protect those who are making the decisions, there is no precedent whatsoever in law. Even juries must reveal how they voted.

The Quality of Academic Decisions

I see no reason to give a special privilege to the academic community. When one looks at the quality of the decisions made in secret, what do we find? People who are turned down in one institution because their scholarly qualities are deemed to be inadequate move to another institution where they achieve renown. As a data-oriented community, we in the academy should examine our own studies.

Jerry Bergman in his study of "Peer Evaluation of University Faculty," which does not address the issue of confidentiality or secrecy in the making of decisions or the procedures of self governance, confines himself to the merit of the resulting actions. He writes: "Tenure has been essentially a popularity vote and has been linked by many administrators to the elite yacht clubs which have excluded Jews, women and, of course, blacks and other miniority groups for decades. Achieving tenure was largely being elected to the club which is largely based on one's sex, race, religion, beliefs and in short, whether or not the club members can get along with the neophyte. Therefore, it can safely be said that tenure is or, at least often usually is based on illegal criteria." (Emphasis in the original.) But he is optimistic. "This though will likely in the future change. And why? It seems that employee lawsuits will perfect a change in the process of obtaining tenure and promotion."

If this happens in only a fraction of the cases, we need this glare of publicity on the process. We cannot tolerate a cloak of secrecy around the making of academic judgments. Society has said we have a special concern with the elimination of discrimination based on ethnic origin or sex. The only remedy is public exposure, open grievance procedures and judicial intervention.

I have no opinion on the issues of fact involved in the court case that resulted in Dr. Dinnan's citation for contempt. But I do know that if I wanted to discriminate against women and blacks, the best method would be star-chamber proceedings under which nobody is allowed to talk about what led to the decision of the committees. I have sat on such commitees. I have heard discussions of candidates in which questions have been raised about candidates for appointment. Does Mrs. So-and-So have a child? Won't she miss classes when the youngster is sick? If she does come in on such occasions, won't her mind be elsewhere than on the work in the classroom? What does her husband do? If he's an executive, is he likely to be moved to a new location, so that she would have to leave? Of course, such questions are forbidden by law but I've heard these things discussed.

Now if an act is forbidden by law, should not the Judiciary have a right to inquire into whether it has been violated? The courts, not only have the right but the duty to inquire into whether the law is being violated.

New Atmosphere

We are now living in a period in which important social changes have occurred. The economic plight of higher education requires we rethink old methods. In the past the consequences of a bad, even a prejudiced, decision were not so serious but what society could afford to pay the price for it. In those days if a faculty member were turned down, for whatever reason, he or she could move on to another campus. There was another job waiting. Today a refusal to reappoint may mean the end of a career. The truth is that conditions have changed so substantially that the genteel tradition of collegiality has fallen before the employment statistics in higher education today.

Moreover, in a society that enacted Sunshine Laws and Freedom of Information Act, do you think it is still tenable to maintain the kind of secrecy that operates where the career of an academic is on the line? I can see what the FBI files say about me, but I cannot see what the administrative file of my college says about me at the present time. I can look at the files of the CIA, within limits, but not at the minutes of a P&B Committee of my college. A president of the United States can be forced to surrender the tapes that recorded his conversations with intimate advisors in the Oval Office, but a professor cannot penetrate the conversations that took place in a smoke-filled committee room on the campus.

If a janitor is fired from his job in your college, his union will see to it that there be a complete and open revelation of the reasons that led to that discharge. But not so in the case of the college professor. It is sociologically untenable that college professors should have fewer rights in society. Dr. Dinnan may be right that we are in danger of losing many of our rights. Encroachments are occuring. That happened when the Supreme Court of the United States said that though a janitor on the college campus may have a union, the professor on the college campus is not to have the protection of the National Labor Relations Act. Yes, there is danger but the dangers are much more complex than the issue of confidentiality, and they come from many directions.

Due Process

Secrecy of decision-making is incompatible with due process. It violates the right of confrontation. During the McCarthy era, President Eisenhower made this statement: "I was born and raised in Abilene, Kansas. That town had a code and I was raised as a boy to Prize that code. It was meet anyone face to face with whom you disagree. You could not sneak up on him from behind, do any damage to him without suffering the penalty of an outraged citizen. In this country, if someone dislikes you or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind without suffering the penalties which an outraged citizenry will inflict. If we are going to be proud that we are Americans, there must be no weakening of the codes by which we have lived." It is time that the ethic of Abilene is accepted in the groves of academe.

The Supreme Court has said that due process for persons charged with crime includes "reasonable notice of the charges against him, an opportunity to be heard in his own defense and the right to confront and cross examine witnesses against him." But you and I know what happens in our institutions that are dedicated to knowledge and the pursuit of truth. When a professor of philosophy comes up for consideration, does he have a right to know that he was rejected because his colleagues are positivists and he is an existentialist, or vice versa? Does the economist who's turned down have a right to know that he's being kicked out because his colleagues are Galbraithians and he's a Friedmanite, or vice versa? In a Psychology Department, are we not to know whether somebody is being turned out because he's a Freudian and the others are Benavior-Modification advocates. This fragile flower of our academic community will disintegrate if we dare not tell each other on what grounds we base our decisions.

Accountability

The secrecy principle violates good management. How are you going to hold those who make personnel decisions accountable unless there is knowledge of what they said and did in making their decisions?

We know that our evaluations are not objective but impressionistic. We have not yet been able to define what it is that makes the great scholar. Nor, the criteria which indicate what the great teacher is like. Joseph Epstein's collection of articles on great teachers that appeared in the American Scholar prove the point. All of the reviewers who dealth with the book agree that none of the writers on any of these teachers really tell why they were outstanding. The truth is that we dare not claim our yardsticks are so objective that they do not require scrutiny by any other source.

I think I know my colleagues. With all their faults, which I know I share with them, I admire them for their achievements and their integrity. But I'm old enough to know that when I am most biased, I am least likely to recognize the fact that I am prejudiced. Such is the very nature of prejudice. There's always a rationalization that can serve as the groom who buckles us in the armor of reason, so-called, and then drapes the armor with the silks of dedication to the noble cause. Is there anybody among us here who can deny that the academy has been guilty of discrimination like the rest of our society? But let me say this too in closing. Precisely because I'm among those who oppose the use of quotas to remedy what has happened, because I consider that remedy as abhorrent as the disease itself, I want to be sure that we have available to us a system, a procedure that prevents discrimination from controlling decisions in the individual cases. And that's why I argue that personnel decisions in higher education must be just as open and subject to review as similar decisions in the rest of society.